LIBRARY
SUPREME COURT, U. S.

IN THE

Supreme Court of the United States

October Term, 1967

No. 840

WARD M. MILLER,

Appellant,

v.

DOCTOR ROBERT A. HAINES, DIRECTOR, DEPARTMENT OF MENTAL HYGIENE AND CORRECTION, STATE OF OHIO, ET AL.,

Appellees.

On Appeal from the Supreme Court of the State of Ohio

JURISDICTIONAL STATEMENT

Franklin T. Harrison, Jr.,
Harrison & Hoffman,
Attorneys for Appellant,
40 S. Third St., Columbus, Ohio 43215.

Merrick Law Printing Co., Columbus, Ohio 43215

INDEX
and
Table of Citations

	Page
Jurisdictional Statement	1
Opinions Below	2
Jurisdiction	2
Questions Presented	3
Statutes Involved	4
Statement	5
The Question Is Substantial	9
Appendix A—	
Entries of the Supreme Court of the State of Ohio	1a
Appendix B—	
Decision of the Court of Appeals	4a
Appendix C—	
Entry of the Court of Appeals	6a
Appendix D—	
Decision of the Court of Appeals Upon Reconsideration	8a
Appendix E—	
Entry of the Court of Appeals Upon Reconsideration	10a
Appendix F—	
Decision of the Common Pleas Court	12a
Appendix G—	
Entry of the Common Pleas Court	32a
Appendix H—	
Section 5121.01, Ohio Revised Code	35a
Section 5121.02, Ohio Revised Code	35a
Section 5121.03, Ohio Revised Code	35a
Section 5121.04, Ohio Revised Code	36a
Section 5121.05, Ohio Revised Code	36a

Page

Section 5121.06, Ohio Revised Code 37a
Section 5121.07, Ohio Revised Code 37a
Section 5121.08, Ohio Revised Code 37a
Section 5121.09, Ohio Revised Code 37a
Section 5121.10, Ohio Revised Code 38a
Section 5121.11, Ohio Revised Code 38a
Section 5121.12, Ohio Revised Code 39a
Section 5121.13, Ohio Revised Code 39a
Section 5121.14, Ohio Revised Code 39a
Section 5121.15, Ohio Revised Code 40a
Section 5121.16, Ohio Revised Code 40a
Section 5121.17, Ohio Revised Code 40a
Section 5121.18, Ohio Revised Code 41a
Section 5121.20, Ohio Revised Code 41a

Appendix I—
Section 5121.02, Ohio Revised Code 42a
Section 5121.03, Ohio Revised Code 42a, 43a
Section 5121.04, Ohio Revised Code 45a, 48a
Section 5121.05, Ohio Revised Code 53a
Section 5121.051, Ohio Revised Code 54a
Section 5121.06, Ohio Revised Code 55a
Section 5121.07, Ohio Revised Code 56a, 57a
Section 5121.21, Ohio Revised Code 57a

Appendix J—
United States Constitution, Amendment XIV, Section I 59a

Appendix K—
Department of Mental Hygiene of California v. Kirchner, Administratrix, 380 U.S. 194 ... 60a

CITATIONS

	Page
Department of Mental Hygiene of California v. Kirchner, Administratrix, 380 U. S. 194	8, 11, 12, 13, 15, 16, 5a
Department of Mental Hygiene v. Kirchner, 379 U. S. 811	7, 12
Department of Mental Hygiene v. Kirchner, 43 Cal. Rptr. 329, 400 P.2d 321	13
Department of Mental Hygiene v. Kirchner, 36 Cal. Rptr. 488	11, 14, 15
Department of Mental Hygiene v. Kirchner, 29 Cal. Rptr. 312	11
I *Ohio Convention Debates* (1851) pp. 539 et seq.	9

IN THE

Supreme Court of the United States

October Term, 1967

No. ____

WARD M. MILLER,

Appellant,

v.

DOCTOR ROBERT A. HAINES, DIRECTOR, DEPARTMENT OF MENTAL HYGIENE AND CORRECTION, STATE OF OHIO, ET AL.,

Appellees.

On Appeal from the Supreme Court of the State of Ohio

JURISDICTIONAL STATEMENT

Appellant appeals from the final order and judgment of the Supreme Court of the State of Ohio, entered on June 28, 1967, since said final order dismissed appellant's appeal as of right and also from the order of the Court of Appeals of Franklin County, Ohio, entered on February 6, 1967. The Supreme Court of the State of Ohio, by order entered June 28, 1967, refused to require said Court of Appeals to certify its record to said Supreme Court. Appellant submits this statement to show that the Supreme Court of the United States has jurisdiction of the appeals herein and that a substantial question is presented.

OPINIONS BELOW

The order of the Supreme Court of the State of Ohio, dismissing Petitioner's appeal as of right and overruling the motion for an order directing the Court of Appeals for Franklin County, Ohio, to certify its record, is unreported and attached hereto as Appendix "A".

The decision and judgment entry of the Court of Appeals of Franklin County, Ohio, and the decision and judgment entry upon reconsideration in said Court are unreported and attached hereto as Appendices "B", "C", "D" and "E", respectively. Lastly the decision and judgment entry of the Common Pleas Court of Franklin County, Ohio, is unreported and attached hereto as Appendices "F" and "G" respectively.

JURISDICTION

This action was brought in equity, originating in the Common Pleas Court of Franklin County, Ohio, seeking to enjoin the enforcement of relative support liability under Ohio Revised Code Sections 5121.01, et seq., the so-called "pay-patient" statutes, as being unconstitutional under both the Ohio and Federal Constitutions.

Appellate review is sought of the final order and judgment of the Supreme Court of the State of Ohio, entered on June 28, 1967, which dismissed appellant's appeal as of right on the grounds that no substantial constitutional question existed, thereby affirming both the initial decision of the Court of Appeals of Franklin County, Ohio, and its decision on rehearing. Judgment entry on both Appellate Court decisions was entered on February 6, 1967. Review is also sought of said entry of the Court of Appeals of Franklin County, Ohio, insofar as it affirms the Court of Common Pleas of Franklin County, Ohio, as the Supreme Court of the State of Ohio, by a separate final order

entered June 28, 1967, refused to require said Court of Appeals to certify the record to said Supreme Court.

The notice of appeal, pursuant to Rules of the Supreme Court of the United States Section 10, was filed on September 21, 1967, in the Court of Appeals for Franklin County, Ohio and the Supreme Court of the State of Ohio. Jurisdiction of the Supreme Court of the United States to review this decision is conferred by Title 28, United States Code, Section 1257,(2), since the State statutes were held valid in light of the Federal constitutional challenge.

QUESTIONS PRESENTED

1. Are State statutes that select, with no rational basis, one particular class of persons for a species of taxation used solely to maintain the mentally retarded in State institutions designed to protect that State's society as a whole from the inmates so confined, as well as for the protection of the inmates themselves, violative of the due process and equal protection provisions of the Fourteenth Amendment to the Federal Constitution of the United States of America?

2. Is State legislation which is discriminatory in that it obligates parents and relatives to pay the costs of maintaining a mentally retarded individual incarcerated in State institutions with no recorded criminal experience, while the parents and relatives of an individual indicted for or convicted of a crime and incarcerated as a matter of law in the same mentally retarded institutions are not so obligated, violative of the due process and equal protection provisions of the Fourteenth Amendment to the Federal Constitution of the United States of America?

3. Do a series of statutes which invest an administrative department with the power to assess and collect certain taxes from the parents and relatives of mentally re-

tarded inmates incarcerated in State supported and controlled institutions, and by direction give said department the power to determine, increase, reduce, or forgive the amount of said assessments without right of appeal or relief of any nature whatsoever, and which may be and are interpreted so as to preclude the withdrawal of one so incarcerated to avoid further accumulation of liability, contravene the due process and equal protection provisions of the Fourteenth Amendment to the Federal Constitution of the United States of America?

STATUTES INVOLVED

Sections 5121.01, 5121.02, 5121.03, 5121.04, 5121.05, 5121.06, 5121.07, 5121.08, 5121.09, 5121.10, 5121.11, 5121.12, 5121.13, 5121.14, 5121.15, 5121.16, 5121.17, 5121.18, 5121.20, Ohio Revised Code, in effect during 1960, the start of Appellant's litigation in the state courts, are set forth in Appendix H.

For the Court's convenience, the following are appendiced hereto:

a) Amendments added to the above Sections of the Ohio Revised Code, after 1960, are set forth in Appendix I.

b) United States Constitution, Amendment XIV, Section I is set forth in Appendix J.

c) *Department of Mental Hygiene of California vs. Kirchner, Administratrix,* 380 U.S. 194, is set forth in Appendix K.

Due to the numerous statutes of the Ohio Revised Code and amendments to same, the citations to the official edition of said statutes are listed in Appendices H and I.

STATEMENT

Appellant Ward Miller, hereinafter referred to as Miller, returned from Air Force overseas duty in 1944 to find that his wife had given birth to a boy afflicted with an abnormality that promised incurable mental and physical retardation. No then or now known medical attention offered the slightest possibility of an alternative prognosis. In August of 1956, Miller, acceding to the advice of his minister, pediatrician and county welfare personnel, and succumbing to environmental social pressures, surrendered this hopelessly mentally retarded son to the Probate Court of Stark County, Ohio, for commitment to an institution as a ward of the state.

At no time during these judicial proceedings was there any advisement of financial obligation for the boy's support; and it was not until after the actual incarceration that Miller was apprised of the fact that he would be required to pay for his son's confinement in the state institution. Miller received an application from the State of Ohio's Department of Mental Hygiene and Correction, hereinafter referred to as the Department, which afforded him an opportunity to present grounds for any reduction in the then current per capita support rate; but this document also explained in detail that the balance caused by the reduction petitioned for, would continue to accrue and be a final charge or lien against his and/or his wife's estate upon their decease if not satisfied prior thereto.

Faced with this engulfing financial liability, Miller investigated the possibility of withdrawing his son from the state institution and was advised that he would not be permitted to do so. With no alternative or escape, Miller applied for a rate reduction and was informed that he might pay $2.80 per week currently, the remainder of the support

charge being accrued and charged to his account. The overall per capita rate for support charged by the Department rose from $15.00 a week in 1956, the year of his son's commitment, to $28.00 a week in 1961. During the same period Miller's weekly accruing obligation increased from $12.20 to $25.20; and by May of 1960, the accumulated amount constituting the State of Ohio's lien again his and his wife's estate had passed the $4,000.00 level.

On May 18, 1960, Appellant Miller filed an injunction action in the Common Pleas Court of Franklin County, Ohio, to restrain further collecting of accruals against him by the Department. The petition in said Common Pleas Court averred that the statutes which provide for and the manner of administration by the state of such proceedings, were violative of the equal protection and due process clauses of both the State and Federal Constitutions. By reason of the succession of a new administration to the Attorney General's office, Counsel defending the State of Ohio was supplanted in 1960, and all briefs and pleadings were not completed and filed until early 1963. In paragraph 5 of the final judgment entry, dated October 25, 1963 (Appendix G) the Trial Court stated:

> "5. That the so-called "pay-patient statutes, Sections 5121.01, et seq. of the Revised Code of Ohio are valid and are not violative of Article VII, Section 1, of the Constitution of Ohio or of the Fourteenth Amendment of the Constitution of the United States, through a denial of the equal protection of the law, or in the taking of property without due process."

The federal question was also set forth in the brief and assignment of errors presented to the Court of Appeals of Franklin County, Ohio, and in the Motion to Certify and Appeal as of right in the Supreme Court of the State of

Ohio. However, in a cursory entry, (Appendix C), the Court of Appeals first affirmed and then distinguished the trial Court without commenting specifically on the constitutional challenge. The denial by the State Supreme Court to grant jurisdiction (Appendix A), again avoided a specific ruling on the federal question.

Uncontroverted evidence in the Trial Court revealed that for the year immediately preceding that in which the trial was held, there were 8,000 mentally retarded children in state institutions; but that only 922 parents and liable relatives, as defined by the controlling statutes, were taxed for their support. Furthermore, the Ohio law provided that any criminally indicted or convicted person found to be mentally retarded was incarcerated in the same state institutions with no accruing liability for his support, regardless of parent's ability to pay.

In addition, the trial record disclosed that the determination of who is to be assessed and who is not assessed, who is compelled to pay this tax and who is forgiven, the amount to be paid and all such administrative and quasi-judicial determinations, are resolved at a very limited organizational level in the department. Not only were there no statutory guidelines for computation of these discriminatory support rates, but once assessed, the sole appellate review was delegated to the director of the very department that collected and used the tax monies.

Between the time that the final brief had been filed in the Court of Appeals of Franklin County and the application for reconsideration had been heard, the Supreme Court of the United States had undertaken the application for a Writ of Certiorari in the *State of California v. Kirchner* matter, 379 U.S. 811. Justice Harlan, speaking for the Court, remanded the cause to the Supreme Court of Cali-

fornia for clarification. The Supreme Court of California found that the California statutes violated the equal protection clause of the State Constitution, not the Federal; thereby removing the matter from further consideration by the Supreme Court of the United States.

Appellant Miller perfected his appeal to the Supreme Court of the State of Ohio, and despite the fact that the Franklin County Court of Appeals' decision left the issues involving interpretation of the Constitution of the State of Ohio and violation of the Fourteenth Amendment to the Constitution of the United States wholly undecided, the State Supreme Court refused to take jurisdiction of the matter either on petitioner's appeal as a matter of right or the constitutional question involved.

Meanwhile, in January of 1964, the Supreme Court of the State of California handed down a decision in the case of *Department of Mental Hygiene vs. Kirchner* 36 Cal. Rptr. 488 which resolved the very issue then being appealed by Miller to the first court of appellate resort in Ohio: the question of liability for the support of mentally ill patients institutionalized in the State of California. The similarity being foursquare, and the language of the Supreme Court of the State of California reflecting so distinctly and clearly the repugnance characterized by the series of "pay-patient" statutes then in force in that State which so exactly paralleled those controlling in the State of Ohio and 42 sister states, the corresponding violative facets of the State of Ohio "pay-patient" program were emphasized in briefs and arguments before the Ohio Court of Appeals.

The per curiam decision rendered by the Court of Appeals of Franklin County was not conclusive in its disposition of the issues. (See Appendix "B"). Although first affirming the Common Pleas Court and the judgment rendered there, the Appellate Court then limited its decision to the single fact pattern of a parent's obligation to support

his minor child. An interpretation of this redundant judicial determination became even more confusing when on application for reconsideration, the same Ohio Court of Appeals stated that they did not adopt the opinion of Judge Harter, but limited their affirmance of his judgment to the parent supporting the minor child issue. (Appendix "D") This ruling was so journalized as to concisely narrow the Franklin County Court of Appeals holding to that single question of the obligation of a parent for support of his minor child, thereby leaving completely open and undecided the question of the violations of the equal protection and due process provisions of the Fourteenth Amendment to the Federal Constitution as well as the Constitution of the State of Ohio.

THE QUESTION IS SUBSTANTIAL

The question involved in this appeal has plagued mankind for as long as American history is recorded. Those "bereft of reason" complicated orderly attempts at law enforcement from time immemorial, but it was not until the beginning of the 19th century that an attempt was made to differentiate between the incarceration of the insane and that of convicted criminals. In the State of Ohio, at the Constitutional Convention held in Columbus in 1850-51, the problems involving the support of institutions for the incarceration of the insane, the deaf and dumb and the blind were carefully considered and debated, and it is noteworthy that the founding fathers of that State eliminated all mandatory private support and spread the responsibility for the state institutional system as a burden on all of the taxpayers. I *Ohio Convention Debates* (1851) pps. 539 et seq.

The stigma attached to the family relationship or association with a "crazy" person effectively silenced parental outcry as the legislature of not only the State of Ohio but

some 42 other states gradually reworked the original constitutional and statutory commitments providing for state support of the so-called welfare or benevolent institutions. Nominal charges for support grew into burdensome financial obligation and oppressive liens as the scope of welfare and mental hygiene increased. But with the growing frequency of diagnosis, and as medical experimentation proved physiological causation for brain-damage and other such unfortunate aberrations that result in mental retardation, this stigma and social cloud began to gradually dissipate. Genetic research and clinical comparison slowly overcame superstition and folklore to the extent that one mentally retarded child in a family of six did not necessarily mean that the other five would become "crazy" also. As the causation for being "bereft of reason" gained common place knowledge and the complete inability of parents to avoid such results became clearer, some jurists and lawmakers began to revert to the original precepts which defined these unfortunate people as the responsibility, charge and ward of the state. The philosophy of 1851 Ohio crept to the fore and although the majority of probate jurisdictions and state general assemblies still required irretrievable commitment of such a child, as the fog of social repugnance lifted, the inequity and complete unfairness of the burden levied upon those unfortunate parents and people who found themselves caring for these mental abnormalities became clearer.

After World War II the parents, relatives and other caretakers of mentally retarded in the various states began to form themselves into clubs and groups which later became active organizations capable of concerted action. Cases were filed which brought the unfortunate plight of these people to the attention of the lower courts and in

some instances that of the appellate courts of the several states.

As appellant Miller found himself approaching financial obliteration in 1959, people in other jurisdictions gathered sufficient courage and determination to resist the imposition and assessment of the charges appealed from herein.

At approximately the same time that appellant Miller realized that he was at the end of his financial rope, a case was filed in California by the Department of Mental Hygiene of that State against one Evelyn Kirchner, Administratrix, concerning a support bill charged against the Estate of Ellinor Green Vance, whose mother had been incarcerated in a state institution. The Superior Court, City and County of San Francisco, held for the Department, and the administratirix appealed. *Department of Mental Hygiene v. Kirchner* 29 Cal. Rptr. 312. At approximately the time that appellant Miller's appeal to the Franklin County Court of Appeals in Ohio was being briefed by counsel, the Supreme Court of California took jurisdiction of the *Kirchner* case; and in a momentous decision struck down completely the "pay-patient" statutes of Section 6650 of the California Welfare and Institutional Code. *Department of Mental Hygiene v. Kirchner,* 36 Cal. Rptr. 488. During that period of time given to the consideration of the Miller case on the briefs by the Ohio Appellate Court, the State of California applied for a Writ of Certiorari to the Supreme Court of the United States, contending that the California Supreme Court had erred in finding the Section 6650 statutes unconstitutional.

The Supreme Court of the United States entertained the Writ of Certiorari on briefs filed and oral arguments by both sides. *Department of Mental Hygiene v. Kirchner* 380 U.S. 194. In addition to that filed by the State of California

against the State Court's finding, nine Amicus Curiae briefs were submitted for the Supreme Court's consideration. Among these nine, the Attorney General of the State of Ohio stood up to be counted; thereby demonstrating for the record that State's deep concern and interest in the outcome of the question raised by the California decision. With the future validity of similar statutes in 42 of the remaining states at stake, the Supreme Court's adjudication was awaited with concern and anticipation by the state administrations, legislatures, assemblies and judiciary of the entire country. Unfortunately defendant counsel in the *Kirchner* case had not pled the Fourteenth Amendment to the Constitution of the United States at the initial stages of that litigation; and when the matter went up to the Supreme Court of the United States on the Writ of Certiorari, *Department of Mental Hygiene v. Kirchner* 379 U.S. 811, it developed that there was no way to determine whether the Fourteenth Amendment to the Federal Constition or the prohibitions of the well-pled California Constitution had been violated by the California statutes and their administration by that State's Department of Mental Hygiene.

In the October Term of 1964, the *Department of Mental Hygiene of California vs. Kirchner, Administratrix,* 380 U.S. 194 was heard on the Writ of Certiorari by the Supreme Court of the United States. On March 8, 1965, Justice Harlan, speaking for the Court, delivered a decision remanding the cause to the Supreme Court of California for clarification. This result, most disturbing to the proponents of unconstitutionality outside of the State of California, was necessitated by two factors: first, the question of unconstitutionality under the Fourteenth Amendment of the Constitution of the United States had not been raised

in the initial pleadings; and secondly, the Supreme Court of the State of California had not stated clearly which constitution had been transgressed. Relying on sure ground, the Supreme Court of the State of California answered the remanding order by stating that it was the equal protection provision of the Constitution of the State of California which had been violated, and that the Federal Constitution as such had not been considered nor interpreted. *Department of Mental Hygiene v. Kirchner*, 43 Cal. Rptr. 329, 400 P.2d 321. This decision firmly resolved the problem in California, but left the citizens of the remaining states still hanging on the ropes as they were repeatedly bludgeoned by mounting financial burdens.

Appellant Miller is herewith appealing the same question of unconstitutionality that has been resolved in California. Section 6650 of the California Welfare and Institutional Code, which was involved in the *Kirchner* litigation, reads in direct parallel with those statutes of the Ohio Revised Code known as the "pay-patient" statutes, under which the charges and assessment against Miller have accumulated.

By association and analogy, the issue of whether the question advocated in this appeal is of such substantial character as to warrant the jurisdiction of the Supreme Court of the United States has in fact been confirmed. On March 8, 1965, Justice Harlan in delivering the decision in *Department of Mental Hygiene of California vs. Kirchner, Administratrix*, 380 U.S. 194, stated at page 196:

> "... We granted certiorari to consider the important questions involved. 379 U.S. 811
> After plenary briefing and argument, however, we are unable to say with requisite assurance that this Court has jurisdiction in the premises.
> The California Supreme Court did not state whether its holding was based on the Equal Protection Clause

of the Fourteenth Amendment to the Constitution of the United States or the equivalent provision of the California Constitution, or both."

The Court then continued by way of explanation as to the policy of being wary of assuming jurisdiction unless it is plain that a federal question is presented. It is respectfully submitted that in the instant case, the Fourteenth Amendment to the Federal Constitution has been pled from the outset; and that by the very definition so clearly established by the Court in Justice Harlan's decision, this question may once and for all be decided with regard to the 41 states having similar discriminating statutory provisions which violate the due process and equal protection clauses of the Fourteenth Amendment.

It is strongly contended that parents and liable relatives of the mentally retarded in the State of California are presently the only such citizens of the United States who are protected by the relevant prohibitions of the Fourteenth Amendment of the Federal Constitution; and that citizens of comparable status or association in 42 of the remaining 49 states are still suffering the discrimination and unconstitutional deprivation of their property that have been so completely and satisfactorily obliterated by the Supreme Court of the State of California. As the Supreme Court of the State of Ohio found no constitutional question and denied the appeal as a matter of right; the decision of the Franklin County Court of Appeals and its confusing differentiation handed down on the application for reconsideration are now the controlling case law of that State. The result is legal chaos as the assessed relatives and allegedly liable parents raise again in the State's 87 Common Pleas Courts the questions dodged by the Franklin County Appellate Court.

As to the novelty of the question under consideration, the California Supreme Court in *Kirchner* commented on page 490 as follows:

"Although numerous cases can be cited wherein so-called support statutes have been sustained against various attacks,[5] research has disclosed no case which squarely faced, considered, discussed and sustained such statutes in the light of the basic question as to equal protection of the law in a case wherein it was sought to impose liability upon one person for the support of another in a state institution.....

[5] See, e.g., State v. Bateman (1922) 110 Kan. 546, 204 P. 682, 683 [2]: County of Los Angeles v. Frisbie (1942) supra, 19 Cal 2d 634, 645-646 [11], 122 P2d 526; Mallatt v. Luihn (1956) 206 Or. 678, 294 P2d 871, 878-880 [3-13]: Dept. of Mental Hygiene v. McGilvery (1958) 50 Cal. 2d 742, 760-761 [23] [24], 329 P2d 689; (attacks based on asserted lack of procedural due process).
County of Los Angeles v. Hurlbut (1941) 44 Cal. App 2d 88, 92-94 [1-5], 111 P 2d 963; Dept. of Mental Hygiene v. McGilvery (1958) supra, 50 Cal. 2d 742, 754-760 [11-22], 329 P 2d 689; Mallatt v. Luihn (1956) supra, 206 Or. 678, 294 P. 2d 871, 882 [19-25]; Kelley v. State Board of Social Welfare (1947) 82 Cal. App. 2d 627, 631-632 [2], 186 P. 2d 429; (attacks based on certain limited claims of discriminatory classification).
Maricopa County v. Douglas (1949) 69 Ariz. 35, 208 P. 2d 646, 649 [8-9] (attack based on claim of double taxation); Dept. of Mental Hygiene v. McGilvery (1958) supra, 50 Cal. 2d 742, 761 [25]. 329 P. 2d 689, and Mallatt v. Luihn (1956).

(36 Cal. Rptr. 488)

Current research updates Justice Schauer's comment on the paucity of case law and precedent in this area; thereby revealing the disturbing pattern of having clearly identical sets of statutes in one state being found in contravention of the equal protection provisions of the constitution of that state, while in 42 sister states parallel sets of legislation remain in force. Appellant Miller's attack in the Supreme Court of the State was neatly parried by refusal to take jurisdiction; thereby leaving the issue of constitutionality unresolved in her sister states and confused in Ohio. The question is certainly of grave concern and substance as it now applies to all states with "pay-patient" or support statutes, saving California. It cannot be argued that the importance of the issues involved in this appeal are limited to the appellant herein and the single state of Ohio; for on page 200 of Justice Harlan's decision in the Supreme Court of the United States in *Kirchner* we find:

"....While the ambiguity of the opinion might normally lead us to dismiss the writ of certiorari as im-

providently granted, we think the preferable course is to leave the way open for obtaining clarification from the California Supreme Court (*Minnesota vs. National Tea Co., supra*), in view of the importance of and wide spread interest in the case.[8] . . . . . .

[8] Forty-two States, Puerto Rico, and the District of Columbia have similar statutes on their books, and nine States have filed *amicus* briefs in this Court, either supporting the petition for certiorari or the petitioner's position on the merits. *Department of Mental Hygiene v. Kirchner*, 380 U.S. 194.

The Miller case, as herewith advocated, once again affords the opportunity for a determination by the Supreme Court of the United States of the substantial questions and issues raised by this appeal; and of the constitutionality of the "pay-patient" or support statutes of not only Ohio, but 41 other states.

Respectfully submitted,

FREEMAN T. EAGLESON, JR.
Attorney for Appellant
40 South Third Street
Columbus, Ohio 43215

APPENDIX A

THE SUPREME COURT OF THE STATE OF OHIO

THE STATE OF OHIO,)
City of Columbus.)

1967 *TERM*
To wit: June 28, 1967

WARD M. MILLER,
Plaintiff-Appellant,

vs.

ROBERT A. HAINES, DIR., ETC., ET AL.,
Defendants-Appellees.

No. 40873

APPENDIX

MOTION FOR AN ORDER DIRECTING
THE COURT OF APPEALS
for FRANKLIN *County*
TO CERTIFY ITS RECORD

It is ordered by the Court that this motion is overruled.
COSTS,
Motion Fee, $20.00, paid by F. T. Eagleson, Jr.
I, Thomas L. Startzman, Clerk of the Supreme Court of Ohio, certify that the foregoing entry was correctly copied from the Journal of this Court.

Witness my hand and the seal of the Court
this ..... day of ..... 19.....
..... *Clerk*
..... *Deputy*

providently granted, we think the preferable course is to leave the way open for obtaining clarification from the California Supreme Court (*Minnesota ex rel. National Pac. Co.*, *supra*), in view of the importance of and wide spread interest in the [illegible]."

[illegible] Forty-two States, Puerto Rico, and the District of Columbia have similar statutes on their books, and nine States have filed amicus briefs in the Court, either supporting the position for reversal of the petitioner's position on the merits. *Department of Mental Hygiene v. Kirchner*, 380 U.S. 194.

The Miller case, as herewith advocated, once again affords the opportunity for a determination by the Supreme Court of the United States of the substantial questions and issues raised by this appeal, and of the constitutionality of the "pay-patient" or support statutes of not only Ohio, but all other states.

Respectfully submitted,

FREEMAN T. EAGLESON, JR.
Attorney for Appellant
40 South Third Street
Columbus, Ohio 43215

APPENDIX

APPENDIX A

THE SUPREME COURT OF THE STATE OF OHIO

THE STATE OF OHIO,)
City of Columbus.)

1967 *TERM*
To wit: June 28, 1967

WARD M. MILLER,
Plaintiff-Appellant,

vs.

ROBERT A. HAINES, DIR., ETC., ET AL.,
Defendants-Appellees.

No. 40873

MOTION FOR AN ORDER DIRECTING THE COURT OF APPEALS

for FRANKLIN *County*

TO CERTIFY ITS RECORD

It is ordered by the Court that this motion is overruled.
COSTS:
Motion Fee, $20.00, paid by F. T. Eagleson, Jr.
I, Thomas L. Startzman, Clerk of the Supreme Court of Ohio, certify that the foregoing entry was correctly copied from the Journal of this Court.

Witness my hand and the seal of the Court this ....day of .....19....
..... *Clerk*
.....*Deputy*

THE SUPREME COURT OF THE STATE OF OHIO

THE STATE OF OHIO,)
City of Columbus.)

1967 TERM
To wit: June 28, 1967

No. 40873

APPEAL FROM THE COURT OF APPEALS

for FRANKLIN *County*

WARD M. MILLER,
Plaintiff-Appellant,

vs.

ROBERT A. HAINES, DIR., ETC., ET AL.,
Defendants-Appellees.

This cause, here on appeal as of right from the Court of Appeals for FRANKLIN *County, was heard in the manner prescribed by law, and, no motion to dismiss such appeal having been filed, the Court sua sponte dismisses the appeal for the reason that no substantial constitutional question exists herein.*

It is further ordered that the appellee recover from the appellant its *costs herein expended; that a mandate be sent to the* COMMON PLEAS COURT *to carry this judgment into execution; and that a copy of this entry be certified to the Clerk of the Court of Appeals for* FRANKLIN *County for entry.*

THE SUPREME COURT OF THE STATE OF OHIO

THE STATE OF OHIO,)
City of Columbus.)

1967 TERM
To wit: June 28, 1967

No. 40873

MANDATE

WARD M. MILLER,
Plaintiff-Appellant,

vs.

ROBERT A. HAINES, DIR., ETC., ET AL.,
Defendants-Appellees.

To the Honorable COMMON PLEAS COURT
Within and for the County of FRANKLIN, *Ohio,*
Greeting:

The Supreme Court of Ohio commands you to proceed without delay to carry the following judgment in this cause into execution:

Dismissed, sua sponte, no substantial constitutional question involved.

THOMAS L. STARTZMAN,
Clerk

.....*19*....
.....
.....*Deputy*

RECORD OF COSTS

Docket Fee.....$20.00 *Paid by* F. T. Eagleson, Jr.

APPENDIX B

IN THE COURT OF APPEALS OF FRANKLIN COUNTY, OHIO

No. 7545

WARD M. MILLER,
Plaintiff-Appellant,

v.

DOCTOR ROBERT A. HAINES,
Director, Department of Mental Hygiene and Correction,
State of Ohio,

and

WALTER S. BURKE,
Supervisor, Bureau of Support,
Department of Mental Hygiene and Correction,
State of Ohio,
Defendants-Appellees.

DECISION

Rendered on April 26, 1966

MR. FREEMAN T. EAGLESON, JR.
40 South Third Street
Columbus, Ohio,
and
MR. DONALD A. HERTLEIN,
1495 Morse Road,
Columbus, Ohio,
For Plaintiff-Appellant.

MR. WILLIAM B. SAXBE, Attorney General,
MISS JOANNE WHARTON, Assistant,
Statehouse Annex,
Columbus, Ohio,
For Defendants-Appellees.

PER CURIAM.

Having considered the case involving the *Department of Mental Hygiene of California* v. *Evelyn, Kirchner, Admx.*, 380 U.S. 194, also 60 Cal. 2d 716, 388 P. 2d 720, the briefs and arguments of the parties, we are of the opinion that there is nothing which calls for a change in the judgment of the Common Pleas Court, and the judgment rendered by Judge Joseph M. Harter will be affirmed.

It should be noted that this case involves only the obligation of a parent for support of his minor child, and we would limit the decision in this case to that question alone.

Judgment affirmed.

BRYANT, P. J., DUFFY and DUFFEY, JJ., concur.

There is one appellate court decision which is referred to by counsel for both sides in this litigation as at least hinting at the proposition that the insane, blind and deaf were *put into a single class* by the constitution, but neither counsel accepts the ultimate decision of that case as entirely sound law; quite obviously, the writer of this opinion made a substantial mistake in thinking all three groups (blind, deaf and insane) were treated alike under the "pay-patient" statutes. The case thus referred to is that of *Rice, Guardian vs. State of Ohio* (1918—Knox County Court of Appeals), 14 Ohio Appeals 9. We do not believe the *Rice, Guardian* decision helps in the solution of our present problem because the writer of that opinion was so patently under a misapprehension of fact. I cannot accept the *Rice-Guardian* decision as a holding that the insane, blind and deaf constitute a single class because of this patent error.

Counsel for the plaintiff also refers to a decision by Judge Dana F. Reynolds of this court in this case, dated February 15, 1961, overruling a general demurrer to plaintiff's amended petition. On page 7 of Judge Reynolds' typed opinion, he referred to the *Rice, Guardian* appellate court opinion, supra, and pointed out that the author of that *Rice* decision "seems to have been under the impression that the 'pay-patient' law applied to the inmates of *all* of the State's benevolent institutions." He then quoted from page 11 of the *Rice, Guardian* opinion, and continued: "If this were true, of course, plaintiff would have no case, but the fact that it is not true and that the deaf and blind are excepted from the effect of the 'pay-patient' law, affords the basis of plaintiff's claim as to the unconstitutionality of the law in question."

As I see it, this language from Judge Reynolds' opinion did not purport *to dispose of* the actual issue presented by this phase of this litigation; rather, as I see it, he was

merely recognizing that an arguable issue was presented and that there had been a mistake in the reasoning of the judge who wrote the *Rice, Guardian* opinion. Accordingly, I feel compelled to disregard this part of the Reynolds' decision. There is another point in Judge Reynolds' opinion which will require comment, but I will reserve consideration of that point until later in this opinion.

As I see it, counsel for the plaintiff is placing undue emphasis *upon only a part of* the pertinent constitutional provision. He is saying, in effect: The Supreme Law of Ohio, the Constitution, established a class of three groups in using the words "Institutions for the benefit of the *insane, blind, and deaf* (*and dumb*) shall always be fostered and supported by the state"; the establishment of that class of *three* groups shall be inviolate and binding upon all general assemblies hereafter; if any one of these groups is favored over another, such favoring shall render the legislation attempting such favoring void as unconstitutional. I suggest that this is in error—that, on the contrary, the *whole* section of the constitution must be examined and, when this is done, the preamble as to the fostering and supporting of institutions for the benefit of these three groups by the state must be "subject to such regulations as may be prescribed by the general assembly," and, in so doing, the ultimate responsibility for legislation and the attendant classifications shall rest with the general assembly.

The analogy is close to many arrangements made in the Constitution and particularly to the arrangement made in the constitution as to the establishment of courts. Article IV, Section 1, of the Constitution provides:

> "The judicial power of the state is vested in a supreme court, courts of appeal, courts of common pleas, courts of probate, and such other courts inferior to the courts

APPENDIX C

IN THE COURT OF APPEALS, FRANKLIN COUNTY, OHIO

Case No. 7545

WARD M. MILLER,
Plaintiff-Appellant,

vs.

DOCTOR ROBERT A. HAINES, ET. AL.,
Defendants-Appellees

ENTRY

(Filed, Court of Appeals, Franklin Co., Ohio, 1967, Feb. 6)

This cause came on for hearing on Plaintiff-Appellant's appeal from the Judgment and final order of the Franklin County Common Pleas Court in favor of Defendants.

The matter was submitted to this Court upon the Bill of Exceptions, the record of the Trial Court, the original papers in the case, and the Assignment of Errors. Briefs and oral arguments were submitted for consideration by the Court in reaching its first decision, and briefs were filed in conjunction with Appellant's motion to reconsider.

This Court, being fully advised in the premises, finds that there is nothing which calls for a change in the Judgment of the Common Pleas Court and affirms same limiting its decision to the single question of the obligation of a parent for support of his minor child, all as set forth in the decision of this Court rendered April 26, 1966, which decision is incorporated herein as though fully rewritten.

Appellant having filed a Motion to reconsider, this Court did so reconsider and in denying same, again limited its affirmance of the Common Pleas Court Judgment to that

issue in this case relative to the obligation of a parent for the support of his minor child, all as set forth in the decision of this Court rendered January 17, 1967, which decision is incorporated herein as though fully rewritten.

IT IS THEREFORE, ORDERED, ADJUDGED AND DECREED, that the Judgment of the Franklin County Common Pleas Court be and the same hereby is affirmed as to the issue involving the obligation of a parent for the support of his minor child;

Costs to Plaintiff-Appellant. Exception to Plaintiff-Appellant.

/s/ JOHN J. DUFFY
Judge
/s/ JOHN J. DUFFEY
Judge
/s/ WILLIAM C. BRYANT
Judge

APPROVED:
EAGLESON & ROBISON
By /s/ FREEMAN T. EAGLESON, JR.
Counsel for Plaintiff-Appellant,
WILLIAM B. SAXBE
Attorney General of State
of Ohio
By /s/ WINIFRED A. DUNTON
WINIFRED A. DUNTON
Assistant Attorney General
Counsel for Defendants-Appellees.

APPENDIX D

IN THE COURT OF APPEALS OF FRANKLIN COUNTY, OHIO

No. 7545

WARD M. MILLER,
Plaintiff-Appellant,

v.

DOCTOR ROBERT A. HAINES, DIRECTOR, DEPARTMENT OF MENTAL HYGIENE AND CORRECTION, STATE OF OHIO,

and

WALTER S. BURKE, SUPERVISOR, BUREAU OF SUPPORT, DEPARTMENT OF MENTAL HYGIENE AND CORRECTION, STATE OF OHIO,
Defendants-Appellees.

DECISION

Rendered on January 17, 1967

Mr. Freeman T. Eagleson, Jr.,
Mr. Robert R. Crane,
40 South Third Street,
Columbus, Ohio,
For Plaintiff-Appellant.

Mr. William B. Saxbe, Attorney General,
Mr. J. Dennis Burns, Assistant,
Statehouse Annex,
Columbus, Ohio,
For Defendants-Appellees.

PER CURIAM.

Application for reconsideration denied. We did not adopt the opinion of Judge Harter, and limited our affirmance of the judgment to the issue in this case, the obligation of a parent for the support of his minor child.

Reconsideration denied
and judgment affirmed.

BRYANT, P. J., DUFFY and DUFFEY, JJ., concur.

APPENDIX E

IN THE COURT OF APPEALS, FRANKLIN COUNTY, OHIO

Case No. 7545

WARD M. MILLER,

Plaintiff-Appellant,

vs.

DOCTOR ROBERT A. HAINES, ET AL.,

Defendants-Appellees.

(Filed, Court of Appeals, Franklin Co., Ohio, 1967, Feb. 6)

ENTRY

This cause came on for hearing on Plaintiff-Appellant's appeal from the Judgment and final order of the Franklin County Common Pleas Court in favor of Defendants.

The matter was submitted to this Court upon the Bill of Exceptions, the record of the Trial Court, the original papers in the case, and the Assignment of Errors. Briefs and oral arguments were submitted for consideration by the Court in reaching its first decision, and briefs were filed in conjunction with Appellant's motion to reconsider.

This Court, being fully advised in the premises, finds that there is nothing which calls for a change in the Judgment of the Common Pleas Court and affirms same limiting its decision to the single question of the obligation of a parent for support of his minor child, all as set forth in the decision of this Court rendered April 26, 1966, which decision is incorporated herein as though fully rewritten.

Appellant having filed a Motion to reconsider, this Court did so reconsider and in denying same, again limited its

affirmance of the Common Pleas Court Judgment to that issue in this case relative to the obligation of a parent for the support of his minor child, all as set forth in the decision of this Court rendered January 17, 1967, which decision is incorporated herein as though fully rewritten.

IT IS THEREFORE, ORDERED, ADJUDGED AND DECREED, that the Judgment of the Franklin County Common Pleas Court be and the same hereby is affirmed as to the issue involving the obligation of a parent for the support of his minor child;

Costs to Plaintiff-Appellant. Exception to Plaintiff-Appellant.

/s/ JOHN C. DUFFY
Judge
/s/ JOHN J. DUFFEY
Judge
/s/ WILLIAM C. BRYANT
Judge

APPROVED:
EAGLESON & ROBISON
By /s/ FREEMAN T. EAGLESON, JR.
Counsel for Plaintiff-Appellant,
WILLIAM B. SAXBE
Attorney General of State
of Ohio
By /s/ WINIFRED A. DUNTON
WINIFRED A. DUNTON
Assistant Attorney General
Counsel for Defendants-Appellees.

APPENDIX F

COURT OF COMMON PLEAS, FRANKLIN COUNTY, OHIO

No. 208,046

WARD M. MILLER,

Plaintiff,

vs.

DOCTOR ROBERT A. HAINES, DIRECTOR, DEPARTMENT OF MENTAL HYGIENE AND CORRECTION, STATE OF OHIO,

and,

WALTER S. BURKE, SUPERVISOR, BUREAU OF SUPPORT, DEPARTMENT OF MENTAL HYGIENE AND CORRECTION, STATE OF OHIO,

Defendants.

DECISION RENDERED BY JOSEPH M. HARTER, JUDGE, ON THE 29th DAY OF JULY, 1963

This litigation was instigated May 18, 1960, and evidence was taken for five days in late June of 1961. Since that time there have been several changes in personnel on the defense side of the case. These changes in personnel, among other things, have produced substantial delays in the briefing of the legal questions presented which, although regrettable, could not have been avoided.

For the purposes of this opinion, I will not concern myself with these changes, nor will I undertake any consideration of the legislation which has been enacted at the last two sessions of the legislature which might be said to bear, at least indirectly, upon the issues here involved. I feel I am compelled to pick a point in time where the rights of

the parties are to be considered as "fixed" for the purpose of this litigation, and direct my attention to that point in time, ignoring developments which have occurred since then. The point in time which I must thus choose is, as I see it, the time of the commencement of the suit on May 18, 1960. This choice is made in accordance with Ohio judicial precedent as announced in *Clark vs. Clark* (1870), 20 Ohio St. 128, at 136, and *Weiss vs. Weiss* (Hamilton Com. Pl. 1909), 8 Ohio Nisi Prius (new series) 119, at 120.

The plaintiff, Ward M. Miller, is suing as a so-called "liable-relative" (the father) of a mentally retarded child in the Columbus State School. As such "liable-relative", he asks that this court enjoin, or prohibit, the enforcement of the so-called "pay patient" statutes of Ohio, Sections 5121.01 et seq., Revised Code of Ohio, through the collection or threat of collection, of assessments under such statutes, as against him.

Plaintiff's theory is that the "pay-patient" statutes are unconstitutional and void under Article VII, Section 1, of the Ohio Constitution, in that there is a deprivation of equal protection and a violation of due process of law under the Federal Constitution. He also asserts that, should the statutes themselves be deemed constitutional, their enforcement should be enjoined, as against him, because, in the efforts of the Bureau of Support of the Department of Mental Hygiene of the State of Ohio to enforce such "pay-patient" statutes, unconstitutional inequities have been imposed, or are threatened, as to him.

Counsel for the defendants contend, on the other hand, that there is no unconstitutionality, either in the statutes themselves, or in the way in which they have been, or will be, applied to this plaintiff.

Ever since the Ohio Constitutional Convention was held in 1851 and 1852, our state's constitution has provided in substance in Article VII, Section 1, as follows:

"*Section 1. Insane, blind, and deaf and dumb.* Institutions for the benefit of the insane, blind, and deaf and dumb, shall always be fostered and supported by the state; and be subject to such regulations as may be prescribed by the general assembly."

As pointed out above, plaintiff's challenge to the efforts by the Department of Mental Hygiene to make him contribute toward the support of his retarded child are based upon this paragraph of the Ohio Constitution which, in the first instance of cursory examination, might seem to imply that insane, blind, and deaf citizens of the state should be "taken care of" by the state, subject to control by the General Assembly.

Without, at this point, attempting to be precisely accurate, I can safely observe that the evidence in this case shows that in practice, through the years intervening since 1852, the Ohio General Assembly *has favored* the blind and the deaf, and, quite obviously, has not been equally liberal as to the insane, including retarded children (who are, technically, considered "insane" by current definitions). The blind and deaf children receive board, room and education *at state expense* in *state* institutions; retarded children receive comparable board, room and *some* education, or perhaps more properly some "training", in *state* institutions but there is a difference on the *expense* issue in that *liable-relatives,* according to the plan of the general assembly, *must bear* all, or a substantial portion of, *such expense* as to retarded children in such *state* institutions on what might be referred to as an "ability to pay" test. The so-called liable-relatives of blind or deaf children are not, according to the plan of the general assembly, obligated to contribute *directly* in any way toward the state's expense of board, room and education. They pay travel expenses and for their children's clothing, nothing more.

All citizens of the state must, of course, pay general taxes, and thus we all contribute *indirectly* toward the maintenance of these, and other, state functions. Obviously, however, there is no issue raised here regarding these general taxes and the attendant *indirect* support of state institutions.

It is, in effect, admitted by the parties in this litigation that this inequity does exist under the over-all planning of the legislature. The defense asserts that such inequity is sanctioned by the latter phrase of Article VII, Section 1, of the Constitution in the words "* * * subject to such regulations as may be prescribed by the general assembly". The plaintiff takes the position that the Constitution itself classifies the insane, blind and deaf *together as a single class,* with the attendant, well-settled requirement that all in such class must be treated equally, without discrimination; the defense, on the other hand, while admitting that all in a class must be treated equally and without discrimination, assert that the general assembly properly differentiated between the blind and deaf, on the one hand, and the insane (including retarded children) on the other hand, —that separate classes were created by the legislature with all individuals *in the respective classes* being treated equally and without discrimination.

It thus becomes readily apparent that the first issue which must be resolved here is whether the constitution of Ohio, in the section quoted above, *did create* a single class, or, on the contrary, did it leave it to the general assembly to define the classes and allow such general assembly to deal with them separately and, in practice, unequally.

Counsel agree that there is no *direct* precedent in the Ohio judicial decisions on this precise point, and this court's independent research brings me to the same conclusion.

of appeals as may from time to time be *established by law.*"

Sections 3 and 4 of that Article of the Constitution, in dealing with common pleas courts, use the phrases "as may be provided by law" and "shall be fixed by law". In this fashion, the Constitution places the ultimate responsibility for creating additional common pleas judgeships and defining jurisdiction in the legislature. It is the legislative enactment under this delegated responsibility that must be tested for constitutionality—the constitutional convention did not, and could not in the very nature of things, undertake to make its language in the constitution self-executing. On this point, attention is directed to the case of *State vs. Kiesewetter* (1882) 37 Ohio St. 546, at page 549, and the case of *State ex rel. Price, Attorney General vs. Huwe, Treasurer* (1922) 105 Ohio St. 304, syllabi 1 and 2.

According to my research, I cannot find any situation where a court has held that a *constitution* establishes a class; it is the *legislative body* that establishes the class when it enacts legislation pursuant to constitutional mandate. It is the statute, not the constitution, which is scrutinized to see that general, public laws operate equally on all persons in like circumstances, and that classifications must be natural and reasonable, not arbitrary or capricious. I am not holding that a constitution cannot establish a classification. In a proper situation and with suitable wording, it might do so. I hold, rather, that it *did not* do so here.

If these two premises are sound, i.e. (1) that the *whole* of the pertinent section of the constitution, not just a *part* of it, must be looked to, including the part which delegates regulatory power to the general assembly, and (2) that the statutes, rather than language of the constitution, must be looked to for the establishment of constitutionally valid

classes, I must next consider whether the general assemblies have through the years properly set up classifications in dealing with the blind, deaf and insane, separately, and even inequitably as between the three groups, but equally as between the persons within the respective classes so created.

There is, of course, a wealth of judicial precedent as to how classes may be established. I will not undertake here a review of such precedents; rather, I will take one sentence from *12 American Jurisprudence, 270, Section 574,* as it was quoted with approval in a recent, unanimous opinion by the Supreme Court of Ohio in the case of *State ex rel. McElroy, Attorney General vs. A. M. Kinney, Inc.* (1960) 171 Ohio St. 193, at pages 197 and 198:

> "* * * Due process of law is denied when any particular person of a class or of the community is singled out for the imposition of restraint or burdens not imposed upon, and not to be borne by, all of the class or of the community at large, unless the imposition or restraint is based upon existing distinctions that differentiate the particular individuals of the class to be affected from the body of the community."

This Court must determine whether retarded children, and their responsible relatives, can be differentiated from the blind and the deaf and their responsible relatives, and indeed, from the body of the community. As I see it, the retarded children and their responsible relatives *can be* so differentiated upon the basis of existing distinctions.

The blind and the deaf are, quite obviously, handicapped, substantially but they have minds which function as well as, and sometimes better than, those of individuals without such handicaps. Retarded children are handicapped in quite a different way. Their minds are such that they do not function as do the minds of so-called normal individuals. The retarded children need protection from themselves,

help in daily living, and in some cases perhaps, the public needs protection from them. (Consider in this connection the individuals who may be referred to the State Schools from penal institutions under *Section 5123.40 Revised Code of Ohio,* as discussed in the briefs of counsel for the parties.)

The blind and deaf, while they are aequiring education to allow them to get along in society, and eventually to become capable of supporting themselves, may well require board and room (as, of course, do the retarded children) but they do not require protection from themselves; they require much less help, if any, in daily living, and they certainly do not require any steps to protect the public from them. Tragically, the retarded children usually can never take a place in society. They usually must spend their whole lives under care of one kind or another.

Our society must have institutions for the care and restraint of those of our citizens who require care and restraint. Retarded children, classified as they are under modern medical thought as "insane", must have perpetual care and such restraint, varying of course in degree, but still care and restraint. The blind and the deaf do not have such requirements.

Such need for restraint, in greater or lesser degree, creates a differentiation upon the basis of existing distinctions between the blind and deaf, on the one hand, and the insane, including retarded children, on the other hand. This distinction was not of the legislature's making; rather, it is, and always has been, founded upon the difference in the handicaps. I could, I believe, find other existing distinctions between these groups if I were to attempt more precise definition of the nature of the handicaps of retarded children, but I do not believe it necessary that I do so. The bare legalistic approach should be sufficient for our purposes.

When I thus find a true differentiation, based upon existing conditions, between retarded children, as one class, and the blind and deaf in another class, I must next consider the status of responsible relatives of such retarded children.

It has been a part of the public policy of western civilizations for centuries that parents shall be financially responsible for the support of their children. The Ohio statute declaring this fundamental rule in general terms is found in *Section 3103.03, Revised Code of Ohio,* in this language:

> "The husband must support himself, his wife, *and his minor children* out of his property or by his labor. If he is unable to do so, the wife must assist him so far as she is able. If he neglects to support his wife, any other person, in good faith, may supply her with necessaries for her support, and recover the reasonable value thereof from the husband unless she abandons him without cause."

Under this statute the primary duty of supporting all children, including retarded children, is upon the father, with a conditional, secondary liability upon the mother. This same duty or burden exists as to the blind and deaf children. However, the general assembly has had the power, as explained above, to differentiate between retarded children, on the one hand, and blind or deaf children on the other. Under such differentration, or classification, the general assembly has had the power to provide more benefits to one class than to another, so long as all within the given class are treated equally. This means that more support, financially, could be legally given by the state to blind and deaf children than to retarded children. The general assembly has, under my theory, had the power to relieve a parent of the burden of support of a handicapped child to a greater or lesser degree so long as all in the single class are treated equitably. The burden of support remains where it always has been (with the parents), but the state lessens that burden by itself helping in, or even in taking over entirely,

the support of such a child. The general assembly makes the decision as to how far and to whom, as between classes of citizens, the State's so-called "charity" shall be extended. There is no prohibition in our constitution against the State's extension of charity to citizens in need of it. The general assembly can decide whether to extend charity to those who are able, themselves, or through their own estates or through responsible relatives, to support themselves. A distinction between the financially helpless and those able to help themselves is a natural and reasonable one. Such distinction is basically at the foundation of the "ability to pay" philosophy which pervades our governmental structure in so many ways today. Even the graduated federal income tax is predicated upon an "ability to pay" doctrine.

Under this reasoning, it follows that the general assembly has had the power to differentiate in the first instance between these classes—i.e. blind or deaf children, on the one hand, and retarded children, on the other hand. Then, as the logical next step, the general assembly has had the power to deal with the rights and responsibilities of *relatives* of such children, following a derivative-status theory, so long as all within the given class are treated equitably and in accordance with due process of law.

For these reasons, I feel compelled to rule that *Sections 5121.01 et seq.*, Revised Code of Ohio, (the so-called "pay-patient" statutes) are valid, and not in violation of Section 1, Article VII of the Constitution of Ohio, or of the Fourteenth Amendment to the Constitution of the United States, through a denial of the equal protection of the law, or in the taking of property without due process of law.

As the second broad base for plaintiff's prayer for injunctive relief here, it is asserted that the "pay-patient" statutes *are administered* as against him in such a way as

to make unjust and illegal discriminations between persons in similar circumstances, and that such inequal administration denies plaintiff the equal justice to which he is entitled under the Federal Constitution.

This contention is predicated primarily upon the administration of the first sentence of *Section 5121.03, Revised Code of Ohio,* which provides:

> "The rate for support of patients of benevolent institutions under the jurisdiction of the department of mental hygiene and correction shall be based on the average per capita cost of the care and treatment of such patients. * * *"

The key words in this sentence for our purposes are "rate of support" and "the average per capita cost". Several specific procedures in the administration of this statute are challenged by plaintiff as such procedures affect him, and a great deal of evidence was taken relating to such procedures.

The problems which are presented on this phase of this case are essentially "cost accounting" problems with which I, with a lawyer's background, have great difficulty. I have always felt frustrated in attempting to deal with accounting issues. Indeed, it has been my observation that most judges share my frustration here. This, perhaps, explains why our court, and many courts, appoint master commissioners so often in attempting to solve accounting issues. In following such a practice, we can obtain the services of those relatively few individuals who are experienced both in law and accounting.

These observations are intended as a preamble to my statement of position as to the accounting issues which have been raised in this litigation. I have carefully considered the record in this case, and the briefs of counsel, with a view toward determining whether, in *broad* outline, not

in *detail,* the plaintiff has shown that there has been, *as to him,* an unjust and illegal discrimination *within his class,* as the parent of a retarded child, in the accounting procedure which the department of mental hygiene of the state was following, or threatened to follow, at the time of the commencement of this suit in May, 1960.

The testimony shows that in 1956, when plaintiff's son was first placed in the Columbus State School, the amount which plaintiff was required to pay under the "pay-patient" procedure was set at $2.80 per week. This was paid continuously until May, 1960. Plaintiff stopped his payments because he felt the charge, as to him, was unconstitutional. At the time the plaintiff's son was placed in the Columbus State School in 1956, the average cost per capita for the individuals in the Columbus State School was $15.75 per week. On January 1, 1958, this figure was increased to $21.00 per week; on January 1, 1960, it went to $24.50 per week (and, subsequent to the commencement of this suit), it went to $28.00 per week as of January 1, 1961.

Plaintiff testified that the aggregate of the unpaid charges by the State against him (over and above the $2.80 per week he actually did pay for nearly four years), was $4,830.00. Documents in evidence tended to show that it was the firm attitude of the Bureau of Support of the Department of Mental Hygiene that either the child's estate, or the plaintiff, or his estate after his death, would be expected to pay this amount, or a larger amount, eventually.

Other testimony in this record shows that while there was no hint at the possibility of cancelling this unpaid obligation in so far as this plaintiff, Ward M. Miller, was concerned, the Bureau of Support of the Department of Mental Hygiene did suggest the methods by which such a cancellation could be accomplished where a case warranted

such action. One of the witnesses, Robert F. Lauer, so testified, and there was an indication of vacilation on the part of the Bureau of Support as to his (Lauer's) obligation regarding his retarded child which was not apparent in the Bureau's attitude toward the plaintiff, Ward Miller.

Judge Dana F. Reynolds of this court, in his decision of February 13, 1961, in overruling a demurrer in this case, alluded to this problem in the following language:

> "While defendants are not presently taking steps to enforce plaintiff's liability, they are regularly reminding him of his obligation and its mounting proportions and this court is of the opinion that there should be a show down with respect to the constitutional question without waiting until after plaintiff's death or until the claimed obligation has reached such proportions as might seriously affect plaintiff's mentality."

As previously explained in this opinion, I believe that Judge Reynolds was holding, when he overruled the demurrer to the amended petition in this case, simply that an arguable case was presented. He was *not* purporting to dispose of the case *on its merits*. I, alone, have the responsibility, on the level of this court, for passing upon the *merits* of this litigation. As previously explained, I have come to the conclusion that the "pay-patient" laws *are* valid and enforceable. As to this phase of their administration, while I cannot give my judicial approval to the apparently inequitable steps at enforcement as between the plaintiff Miller and the witness Lauer, I am not prepared to rule that the inequity is so gross that the extraordinary relief of injunction should be granted by this court. Rather, I hold that, since injunctive relief will be granted only where there is no adequate remedy at law, plaintiff should be relegated to a "legal" (as contrasted with this "equitable") action for exploration of his obligations here. In other words, I feel I must hold that, with the relatively meager

evidence before me, I cannot say that the Bureau of Support has, as a matter of custom and settled usage, so abused its powers in an unequal fashion that I can hold, on this phase of the case, that there has been unjust and illegal discrimination between persons in similar circumstances, denying to plaintiff the equal justice to which he is entitled under the Federal Constitution. This conclusion, however, is not to be deemed a precedent, or as the basis for the application of the doctrine of *stare decises,* in any other litigation in which these or related problems may be raised for judicial consideration.

It is contended by plaintiff that another unequal and discriminatory practice arises under *Section 5121.04, Revised Code of Ohio,* in calling for an investigation of the financial condition of the inmates of state institutions, and of the relatives liable for the support of such inmates, to determine, among other things, whether they are able to provide suitable clothing as required by the superintendent of the institution. It is asserted that, in practice, the responsible relative furnishes clothing for the retarded child but, if a responsible relative does not, and cannot, furnish such clothing, the State furnishes the clothing and then includes the cost thereof in computing "the average per capita cost". If such a practice is followed, quite obviously it would mean, to a relatively small degree, that the responsible relative who furnishes clothing and then is assessed at least indirectly for the cost of clothing for nonpaying inmates, has an increased, unequal burden, and such unequal treatment should be rectified.

However, we must look to the evidence on this point in this record. The evidence disclosed that plaintiff's son has a wheel chair which was supplied to him for use in the Columbus State School by an organization known as the "Parent Volunteer Association of the Columbus State

School." Plaintiff did not buy it. Apart from the reference to the wheel chair, there is *absolutely no evidence* in this case as to any clothing, or anything else, being bought for this retarded child *by plaintiff*, his wife, or anyone else. In view of this absence of testimony, there is no need for me to attempt to apply the double burden as to clothing contention to our fact pattern. The issue is purely academic in our case; accordingly, I cannot find that plaintiff is entitled to injunctive, or any other, relief on this ground.

Plaintiff uses statistics in his opening brief to prove what a small percentage of responsible relatives contribute toward the support of their children in State Schools for the retarded. For the fiscal year ending June 30, 1960, there were 7,746 mentally retarded inmates of the Columbus, Orient and Gallipolis state schools with approximately 300 more at the Applecreek State Hospital—a total of approximately 8,000. Only 922 responsible relatives were being billed for support. 302 of these 922 relatives who were thus billed, paid the full average per capita cost. That means that only 3.78% of the responsible relatives paid their full share. An additional 7.75% of the responsible relatives paid something less than the full share. Adding these two percentages, 11.53% of the responsible relatives contributed "something" and 88.47% of the retarded children were supported, treated and educated or trained exclusively at State expense. While these statistics are interesting, I do not see that they help in the solution of our problems; rather, they show simply how the "pay-patient" laws were administered in accordance with the legislative plan for one particular year. The "ability to pay" doctrine, as applied to this area, is brought into focus.

Repeated references are made to *Section 5123.40, Revised Code of Ohio*, in authorizing the transfer of persons under indictment or conviction for crime to schools for re-

tarded children. An attempt is made to show that such an arrangement creates, at least to a minor degree, a double or unequal burden upon responsible relatives of retarded children who have been entered into the state schools without indictment or conviction first. I cannot agree with the contention to this effect. When a felon becomes an inmate of a state school for the retarded, such felon merely becomes an additional unit to be considered in computing average per capita cost—nothing more, and a responsible relative's burden is not increased. Such burden, arguably, might even be decreased if there is anything to the theory that a greater number of units can usually be handled more economically than a few. In any event, I cannot give credence to this contention as a basis for successful challenge of the constitutionality of the administration of the "pay patient" statutes.

Plaintiff emphasizes the *educational* phase of the treatment afforded retarded children in the state schools and speaks of the Roger Gove School, within the Columbus State School, as being approved by the Ohio Department of Education. Plaintiff contends that the cost of maintaining that school-within-a-school should not be included in computing the average per capita cost because, traditionally, as a matter of Ohio public policy, schooling is free to all. As I see it, the free education concept must be subject to the power of classification by the legislature which has been discussed earlier in this opinion. The legislature has the power and responsibility in this regard; it may establish retarded children as a class and impose burdens upon those retarded children, or their responsible relatives, which are unequal to individuals in other classes or of the community generally. So long as this additional burden operates equally and without discrimination upon all individuals comprising the class, there is no constitutional

prohibition against it. With this as my theory, I see no necessity for a detailed consideration as to the nature of the education, or "training", if that is a more accurate word, afforded the retarded children in the state schools. All in the class are treated equally and without discrimination. This sustains the constitutionality of the administration of the "pay patient" statutes.

A substantial portion of the evidence at the trial of this case was devoted to the methods of accounting as to *farm production* by the representatives of the Department of Mental Hygiene. Some factual discrepancies appeared as between witnesses in this area. These discrepancies, however, are not significant, as I see it, to the issues before me. The "cost accounting" problems should, I believe, be given judicial consideration, not in this case, but, rather in litigation of the type represented by two Franklin County Common Pleas Court cases of about 20 years ago, i.e. *Slade et al vs. Ferguson,* No. 152,891, in our court (unreported) and *State ex rel. Herbert, Attorney General vs. Vermillion, Admr.* (1943) 39 Ohio Law Abstracts 337. In the first of these two cases, John R. King was the judge and Charles A. Leach was the judge in the second. Judge King had appointed Earl F. Morris of the Columbus Bar as Master Commissioner in the case submitted to him. Mr. Morris' report is reported, in substance, with Judge Leach's opinion in 39 Ohio Law Abstract at pages 338 to 348.

I refer to these two cases because an examination of them will disclose the principles of law and accounting which were then deemed applicable to this problem of cost of support of the inmates of what is now the Columbus State School. Judge Leach adopted the reasoning of Judge King and Earl Morris. I will adopt the reasoning of all three.

When these opinions and the Master Commissioner's report are examined, it appears that there was a marked dif-

ference between the earlier cases and the present one in that evidence was offered in them as to what accounting standards in this field should be, while in the present case, there was no such evidence—the evidence here tended, simply, to show that there might well have been some departure from sound accounting practices, *but* what those practices should be was not told to the court. In view of this absence of evidence, I feel compelled to rule that the plaintiff (who had the burden of proving his right to injunctive relief by clear and convincing evidence) failed to meet such burden and failed to show any unconstitutional inequality *as to him.*

This conclusion as to the accounting of the *farm production* items should not, however, be deemed a precedent, or as a basis for the application of the doctrine of *stare decises* in any other litigation in which these, or relative, problems may be raised for judicial consideration.

Complaint is also made by plaintiff that it would be an unconstitutional wrong for the State to allocate any amounts exceeding $5.50 per week, paid to the State by a responsible relative, into a so-called "rotary fund" for the general use of the Division of Mental Hygiene, as contemplated by *Section 5123.03, Revised Code of Ohio.* Quite frankly, I do not understand this contention. As I see it, this part of this statute deals with the problem of handling funds *within the state government itself*—a matter with which this plaintiff is in no way concerned. If the money is due from the plaintiff in accordance with a proper "average per capita cost" computation, it should not be significant to this plaintiff as to what disposition the state may see fit to make of such money *after* the state has obtained title to the money. No inequality or other constitutional issue is apparent to me here.

For the reasons stated, I feel compelled to deny relief to this plaintiff. Exceptions may, of course, be reserved in the Journal Entry.

/s/ JOSEPH M. HARTER
Joseph M. Harter, Judge

APPEARANCES:
EAGLESON and CHILDERS,
Attorneys for Plaintiff,

For Defendants (as of the time of trial)—
MARK MCELROY, Attorney General of Ohio,
JOHN HOSKINS and VICTOR KRUPMAN, Assistant Attorneys General,

For Defendants (as of time of decision)—
WILLIAM B. SAXBE, Attorney General of Ohio,
EUGENE P. EVERHART, Asst. Attorney General.

APPENDIX G.

IN THE COURT OF COMMON PLEAS, FRANKLIN COUNTY, OHIO

Case No. 208,046

WARD M. MILLER,

Plaintiff,

vs.

DOCTOR ROBERT A. HAINES, DIRECTOR, DEPARTMENT OF MENTAL HYGIENE AND CORRECTION, STATE OF OHIO,

and

WALTER S. BURKE, SUPERVISOR, BUREAU OF SUPPORT, DEPARTMENT OF MENTAL HYGIENE AND CORRECTION, STATE OF OHIO,

Defendants.

(Filed, Court of Common Pleas, 1963, Oct. 25, Franklin County, Ohio)

JOURNAL ENTRY

This cause came on for hearing on the testimony, exhibits and trial briefs filed on behalf of the parties and the Court finds it has jurisdiction of the parties and the subject matter of this action.

On consideration thereof, the Court finds and declares:

1. That Article VII, Section 1 of the Constitution of Ohio does not establish a single classification of the insane, blind, and deaf and dumb.
2. That the provisions of Article VII, Section 1 of the Constitution of Ohio do not prohibit the General As-

sembly from differentiating between insane, including retarded children, the blind, and the deaf and dumb.

3. That in fostering and supporting institutions for the benefits of the insane, blind, and deaf and dumb, pursuant to Article VII, Section 1, of the Constitution of Ohio, the State, through legislative action, may set up separate classifications in dealing with the insane, blind, and deaf and dumb, and may differentiate between the treatment of the blind or deaf and dumb children and retarded children and their responsible relatives, as long as all within the given class are treated equally and in accordance with due process of law.
4. That the General Assembly has the power to deal with the rights and responsibilities of relatives of retarded children, following a derivative-status theory, so long as all within the given class are treated equitably and in accordance with due process of law.
5. That the so-called "pay-patient" statutes, Sections 5121.01 et seq. of the Revised Code of Ohio are valid and are not in violation of Article VII, Section 1, of the Constitution of Ohio or of the Fourteenth Amendment of the Constitution of the United States, through a denial of the equal protection of the law, or in the taking of property without due process.
6. That the evidence before the Court establishes that in the apparent enforcement of the "pay-patient" statutes the Bureau of Support proceeded inequitably as between plaintiff and the witness for the plaintiff; however, the Court determines that the inequity is not so gross that the extraordinary relief of injunction should be granted.
7. That the evidence before the Court is insufficient to establish that in the administration of Sections 5121.01

et seq. of the Revised Code, there has been unjust and illegal discrimination between persons in similar circumstances denying to the plaintiff the equal justice to which he is entitled under the Federal Constitution.

IT IS THEREFORE, ORDERED, ADJUDGED AND DECREED, that plaintiff's petition for injunctive relief be hereby denied.

It is further ordered that the Court costs be taxed against the plaintiff.

All to which the plaintiff takes exception.

/s/ HARTER
Joseph M. Harter, Judge

APPROVED:
EAGLESON & ROBISON
By: /s/ DONALD A. HERTLEIN
Donald A. Hertlein
Attorneys for Plaintiff

/s/ WILLIAM B. SAXBE
William B. Saxbe
Attorney General
/s/ JOANNE WHARTON
Joanne Wharton
Assistant Attorney General
Attorneys for Defendants

APPENDIX H

STATUTES IN EFFECT DURING THE 1960 LITIGATION:

Section 5121.01, 120 Ohio Laws 309.

All inmates of a benevolent institution shall be maintained at the expense of the state. Their traveling and incidental expenses in conveying them to the institution shall be paid by the county of commitment. Upon admission, the inmates shall be neatly and comfortably clothed. Thereafter, the expense of necessary clothing shall be borne by the responsible relatives or guardian if they are financially able. If not furnished, the state shall bear the expense. Any required traveling expense after admission to the institution shall be borne by the state if the responsible relatives or guardian are unable to do so.

Section 5121.02, 120 Ohio Laws, 309.

When any person is committed to a state hospital for the mentally ill, to the Gallipolis State Institute, or to an institution for the feeble-minded, the judge making such commitment shall at the same time certify to the superintendent of such institution, and the superintendent shall thereupon enter upon his records the name and address of the guardian appointed and of the relative liable for such person's support under section 5121.06 of the Revised Code.

Section 5121.03, 125 Ohio Laws 859.

The rate for support of patients of a benevolent institution under the jurisdiction of the department of mental hygiene and correction shall be the average per capita cost of the care and treatment of such patients. The cost is computed on the general average per capita expense for such services for the calendar year preceding the period of state care, for;

(A) Receiving hospitals for the mentally ill;

(B) State hospitals for the mentally ill;

(C) State schools for the feeble-minded;

(D) The state institution for epileptics.

Less amounts may be accepted by the department when conditions warrant such action, or when offered by persons not liable for the support of such inmates. Collections in excess of five dollars and fifty cents per week per patient shall be placed in a rotary fund to the credit of the department of mental hygiene and correction, division of mental hygiene, to be used for research, education, and prevention purposes, under rules and regulations prescribed by the director of mental hygiene and correction and the commissioner of mental hygiene.

Section 5121.04, 125 Ohio Laws 860.

The department of mental hygiene and correction shall investigate the financial condition of the inmates of benevolent institutions under its control and of the relatives liable for the support of such inmates, in order to determine the ability of any inmate or such relatives to make payment in whole or in part for the support of the inmate and to provide suitable clothing as required by the superintendent of the institution. In all cases due regard shall be had for others who may be dependent for support upon such relatives or the estate of the inmate.

Section 5121.05, 125 Ohio Laws 860.

The department of mental hygiene and correction may subpoena witnesses, take testimony under oath, and examine any public records relating to the estate of an inmate or of a relative liable for such inmate's support. All information, conclusions, and recommendations shall be submitted to the department by the investigating agent of the department. The department shall determine the amount of support to be paid and whether clothing shall be furnished by the relatives or guardian. An order shall be issued to the persons who are determined liable for such payment, requiring them to pay monthly, quarterly, or

otherwise, as may be arranged, to the state such amount as the department determines.

Section 5121.06, 125 Ohio Laws 860.

A husband may be held liable for the support of a wife; a wife for a husband; a father or mother for a son or daughter; and a son or daughter, or both, for a father or mother, while such wife, husband, father, mother, son, or daughter is an inmate of a benevolent institution under the control of the department of mental hygiene and correction.

Section 5121.07, 125 Ohio Laws 860.

Any person, who has been ordered to make payment for the support of an inmate of any benevolent institution under the control of the department of mental hygiene and correction, may petition the department for a release from, or modification of, such order, and the department, after an investigation, may cancel or modify such former order. The department may for due cause increase the amount previously ordered paid.

Section 5121.08, 125 Ohio Laws 860.

The superintendents of the benevolent institutions under the control of the department of mental hygiene and correction and the committing court, if requested, shall submit to the department such information as they may obtain concerning the financial condition of any inmate or of relatives liable for the inmate's support.

Section 5121.09, 125 Ohio Laws 861.

In case the estate of any inmate in a benevolent institution under the jurisdiction of the department of mental hygiene and correction is sufficient for his support, without hardship to any others who may be dependent thereon, and no guardian has been appointed for such estate, the agent of the department shall petition the probate court of the proper county to appoint a guardian.

Section 5121.10, 125 Ohio Laws 861.

Upon the death of a person who is an inmate, or has been an inmate, of any benevolent institution under the jurisdiction of the department of mental hygiene and correction and who is possessed of property, the executor or administrator shall ascertain from the department whether the deceased person was supported while an inmate, and if not, the department may present a claim for support, or for the balance due in case less than the rate prescribed by section 5121.03 of the Revised Code has been paid. Such claim shall be allowed and paid as other claims against the estate. The department may waive the presentation of any claim when in its judgment an otherwise dependent person will be directly benefited by the estate. The department may accept from a guardian or trustee of an inmate a contract agreeing to pay to the state from the property of his ward before or at the death of his ward a fixed annual amount for the support of such ward while an inmate, and with interest at four per cent per annum. A copy of such contract shall be filed in the probate court of the proper county, and duly entered as a part of the records concerning such ward.

Section 5121.11, 120 Ohio Laws 311.

The state shall bear the expense of the burial of an indigent inmate who dies in a state hospital for the mentally ill, feeble-minded, or epileptic, or in a penal, reformatory, or correctional institution, if the body is not claimed for interment at the expense of friends or relatives, or is not delivered for anatomical purposes or for the study of embalming in accordance with section 1713.34 of the Revised Code. When the expense is borne by the state, interment shall be in the institution cemetery or other place provided by the state. The managing officer of the institution shall provide at the grave of such person a metal, stone, or concrete marker on which shall be inscribed the name and age of such person and the date of death.

Section 5121.12, 63 Ohio Laws 96.

No person, firm, or corporation shall erect or carry on, within one hundred twenty rods of a benevolent institution a rolling mill, blast furnace, nail factory, copper smelting works, boiler factory, petroleum refinery, slaughterhouse, tallow chandlery, or glue, soap, or starch factory, or any other works or business productive of unwholesome or noxious odors or gases or loud noises which may annoy or endanger the health or interfere with the proper treatment of the inmates of such institution.

Section 5121.13, 63 Ohio Laws 96.

A person, firm, or corporation may file a petition in the court of common pleas of the county in which a benevolent institution is located, in which petition the desire to erect or carry on at a less distance than that prescribed in section 5121.12 of the Revised Code shall be set forth, the business prohibited, the precise point of its establishment, and the reasons and circumstances, in its opinion, why the erection or carrying on thereof would not annoy or endanger the health, convenience, or recovery of the inmates of such institution. The petitioner shall give notice in a newspaper of general circulation in the county of the pendency and prayer of the petition for at least six consecutive weeks previous to the term of court next to be held, and serve a written notice upon the superintendent of the institution at least thirty days before the day set for hearing the petition.

Section 5121.14, 63 Ohio Laws 96.

If, upon the hearing of the petition referred to in section 5121.13 of the Revised Code, it appears that the notice has been given as required in such section and the court is of opinion that no good reason exists why such establishment may not be erected or such business carried on and that by the erection or carrying on thereof at the point named, such institution will sustain no detriment, the court

may issue an order granting the prayer of the petitioner. Thereafter the petitioner may locate such establishment or carry on such business at the point named in the petition.

Section 5121.15, 125 Ohio Laws 861.

Upon the application and recommendation of the director of mental hygiene and correction, the governor shall commission not to exceed three employees of a benevolent or correctional institution, designated by the superintendent of such institution, to be special policemen thereof, but the number of employees of the institution, or the compensation of an employee shall not be thereby increased.

Section 5121.16, 81 Ohio Laws 81.

The special policemen provided for in section 5121.15 of the Revised Code shall take an oath of office, and may protect the property of the benevolent or correctional institution, suppress riots, disturbances, and breaches of the peace, and enforce laws for the preservation of good order. Upon view or information, they may arrest, without warrant, any person trespassing upon the grounds or destroying property of such institution, or violating a law of the state, and bring such person before the mayor or a justice of the peace within the proper township.

Section 5121.17, 125 Ohio Laws, 861.

When it is necessary for a state benevolent, correctional, or penal institution to acquire any real estate, right of way, or easement in real estate in order to accomplish the purposes for which it was organized or is being conducted, and the department of mental hygiene and correction is unable to agree with the owner of such property upon the price to be paid therefor, such property may be appropriated in the manner provided for the appropriation of property for other state purposes.

Section 5121.18, 103 Ohio Laws, 658.

Any commission, board, or department vested with authority to erect or manage a state institution located outside the corporate limits of a municipal corporation, may enter into a contract with the council of such municipal corporation upon such terms as may be agreed upon, for the purpose of connecting the sewer system of such institution with that of the municipal corporation. Such contract may include payment for the increased cost to such municipal corporation occasioned by such connection and service rendered. Such contract shall be made for a period of not less than ten years, and must be approved by the governor and the attorney general.

Section 5121.20, 75 Ohio Laws 150.

Claims due a benevolent institution may be sued for in the name of the institution.

APPENDIX I

SUBSEQUENT AMENDMENTS TO THE AFOREMENTIONED STATUTES:

Section 5121.02, 129 Ohio Laws 1448, Effective October 25, 1961.

When any person is hospitalized pursuant to judicial proceedings, the judge ordering such hospitalization shall at the same time certify to the head of such hospital as defined in section 5122.01 of the Revised Code, and the head shall thereupon enter upon his records the name and address of the guardian appointed and of the relative liable for such person's support under section 5121.06 of the Revised Code.

Section 5121.03, 129 Ohio Laws 1111, Effective January 1, 1962.

The rate of support of patients of *** benevolent *** institutions under the jurisdiction of the department of mental hygiene and correction shall be based on the average per capita cost of the care and treatment of such patients. The cost *** of services for mentally ill patients shall be computed on the general average per capita expense for such services at all institutions providing services for the mentally ill, for the fiscal year preceding the calendar year in which care is provided ***. The cost of services for mentally retarded patients shall be computed on the general average per capita expense for such services at all institutions providing services for the mentally retarded, for the fiscal year preceding the calendar year in which care is provided. The rate of support for a mentally ill or a mentally retarded patient shall be that percentage of the average per capita cost, for the type of institution at which such patient receives care, that the patient or his liable relatives are able to pay. The department shall annually determine the ability to pay of a patient or his liable

relatives and the amount that such person shall pay in accordance with section 5121.04 of the Revised Code.

Collections of support payments shall be made by the department and shall be paid to the treasurer of state for deposit in the general revenue fund.

Section 5121.03, 130 Ohio Laws 1183, Effective January 23, 1963.

The rate for support of patients of benevolent institutions under the jurisdiction of the department of mental hygiene and correction shall be based on the average per capita cost of the care and treatment of such patients. The cost of services for mentally ill patients shall be computed on the general average per capita expense for such services at all institutions providing services for the mentally ill, for the fiscal year preceding the calendar year in which care is provided. The cost of services for mentally retarded patients shall be computed on the general average per capita expense for such services at all institutions providing services for the mentally retarded, for the fiscal year preceding the calendar year in which care is provided. The rate of support for a mentally ill or a mentally retarded patient shall be that percentage of the average per capita cost, for the type of institution at which such patient receives care, that the patient or his liable relatives are able to pay. The department shall annually determine the ability to pay of a patient or his liable relatives and the amount that such person shall pay in accordance with section 5121.04 of the Revised Code.

Collections of support payments shall be made by the department and shall be paid to the treasurer of state for deposit in the general revenue fund.

Section 5121.03, 130 Ohio Laws 1184, Effective October 10, 1963.

The rate for support of patients of benevolent institutions under the jurisdiction of the department of mental

hygiene and correction shall be based on the average per capita cost of the care and treatment of such patients. The cost of services for mentally ill patients shall be computed on the general average per capita expense for such services at all institutions providing services for the mentally ill, for the fiscal year preceding the calendar year in which care is provided. The cost of services for mentally retarded patients shall be computed on the general average per capita expense for such services at all institutions providing services for the mentally retarded, for the fiscal year preceding the calendar year in which care is provided. The cost of services for a patient receiving pre-admission care, after-care, day-care, or routine consultation and treatment services in a community service unit under the jurisdiction of the department of mental hygiene and correction, shall be computed on the basis of the average cost of such services. The rate of support for a mentally ill or a mentally retarded patient shall be that percentage of the average per capita cost, for the type of institution at which such patient receives care, that the patient or his liable relatives are able to pay. The department shall annually determine the ability to pay of a patient or his liable relatives and the amount that such person shall pay in accordance with section 5121.04 of the Revised Code.

Collections of support payments shall be made by the department and shall be paid to the treasurer of state for deposit in the general revenue fund, except that the treasurer of state shall place ten thousand dollars from such support payment collections in a special fund, hereby created, to be known as the bureau of support refund rotary fund. Additional deposits shall thereafter be made in such rotary fund from support payment collections so as to maintain a ten thousand dollar balance. Expenditures from such rotary fund may be made by the bureau of support of

the department of mental hygiene and correction for the purpose of making refunds of over-payment of support charges.

Section 5121.04, 129 Ohio Laws 1111, Effective January 1, 1962.

(A) The department of mental hygiene and correction shall investigate the financial condition of the *** patients of benevolent institutions under its control and of the relatives named in section 5121.06 of the Revised Code liable for the support of such *** patients, in order to determine the ability of any *** patient or such relatives to make payment in whole or in part for the support of the *** patient and to provide suitable clothing as required by the superintendent of the institution. In all cases, in determining ability to pay and the amount to be charged, due regard shall be had for others who may be dependent for support upon such relatives or the estate of the *** patient.

(B) The department shall follow the provisions of this division in determining the ability to pay of a patient or his liable relatives and the amount to be charged such patient or liable relatives.

(1) A patient without dependents who has a gross annual income of two thousand dollars or more, regardless of the source of such income, shall pay the full amount of the per capita cost; if his gross annual income is less than two thousand dollars, three-fourths of his income shall be paid for his support and the balance, but not less than twenty-five dollars per month, shall be kept for personal use by or on behalf of the patient.

(2) The ability to pay of a patient with dependents, or a liable relative with or without dependents, shall be determined in accordance with his income and the needs of others who are dependent on such income for support. The patient or his liable relative shall be charged an amount

equal to the percentage of the average per capita cost determined in accordance with the following schedule:

Gross Annual Income of Patient or Liable Relative[a]	Number of Dependents[b] 1	3	3	4	5 or more
	Rate of Support				
$3,000 or less	—	—	—	—	—
3,001 to 3,500	10%	—	—	—	—
3,501 to 4,000	15	10%	—	—	—
4,001 to 4,500	20	15	10%	—	—
4,501 to 5,000	30	20	15	10%	—
5,001 to 5,500	40	30	20	15	10%
5,501 to 6,000	50	40	30	20	15
6,001 to 6,500	60	50	40	30	20
6,501 to 7,000	70	60	50	40	30
7,001 to 7,500	80	70	60	50	40
7,501 to 8,000	90	80	70	60	50
8,000 and over	100	90	80	70	60

[a] Patient or relative may use a copy of his federal income tax return as evidence of his gross annual income or he may use other evidence satisfactory to the department of mental hygiene and correction.

[b] Includes liable relative but excludes patient in institution. "Dependent" includes any person who receives more than half of his support from the patient or his liable relative.

(3) A patient or liable relative having medical, funeral, or related expenses in excess of four per cent of the gross annual income, which expenses were not covered by insurance, may adjust such gross annual income by reducing the gross annual income by the full amount of such expenses. Proof of such expenses satisfactory to the department of mental hygiene and correction must be furnished.

(4) Additional dependencies may be claimed if:

(a) The liable relative is blind.

(b) The liable relative is over 65.

(c) A child is a college student with expenses in excess of fifty dollars per month.

(d) The services of a housekeeper are required if the person who normally keeps house for minor children is the patient.

(5) A patient without dependents who has an estate which is unproductive or which produces less income than that specified in division (B) (1) of this section shall be subject to division (C) of this section.

(6) When a person has been a patient for fifteen years or more and his liable relatives have paid support charges during that period, the department shall continue to determine the amount that such liable relatives shall pay in accordance with this section, except that the rate of support, determined according to the schedule shown in division (B) (2) of this section, shall be reduced by one-half and the liable relatives shall be charged such reduced amount.

(7) The department shall accept voluntary payments from patients or liable relatives whose incomes are below the minimum shown in the schedule set forth in this division. The department shall also accept voluntary payments in excess of required amounts from both liable and nonliable relatives.

(8) If a patient has an insurance contract providing for payment of expenses at a hospital providing services for mental illness or mental retardation, the other provisions of this division shall be suspended while such insurance is in force and such patient shall be charged the full amount of the average per capita cost for services at the type of institution at which the patient receives care.

(C) The department of mental hygiene and correction may enter into agreements with a patient or liable relative for support payments to be made in the future, or may take mortgages on real estate to secure payments from such persons or from a guardian of the estate of a patient, and may record such mortgages in the office of the county recorder in the county where the real estate is located, and enter satisfaction of such mortgages if the support charged is paid in full.

(D) The department shall, after January 1, 1962, make all investigations and determinations required by this section within ninety days after a patient is admitted to an institution under the department's control, and shall immediately notify by mail the persons liable of the amount to be charged.

(E) All actions to enforce the collection of payments agreed upon or charged by the department shall be commenced within six years after the date of default of an agreement to pay support charges or the date such payment becomes delinquent. If a payment is made pursuant to an agreement which is in default, a new six-year period for actions to enforce the collection of payments under such agreement shall be computed from the date of such payment. For purposes of this division an agreement is in default or a payment is delinquent if a payment is not made within thirty days after billing or a payment, pursuant to an agreement, is not made within thirty days after the date specified for such payment.

Section 5121.04, 130 Ohio Laws 1185, Effective October 10, 1963.

(A) The department of mental hygiene and correction shall investigate the financial condition of the patients of benevolent institutions under its control and of the rela-

tives named in section 5121.06 of the Revised Code liable for the support of such patients, in order to determine the ability of any patient or such relatives to make payment in whole or in part for the support of the patient and to provide suitable clothing as required by the superintendent of the institution. In all cases, in determining ability to pay and the amount to be charged, due regard shall be had for others who may be dependent for support upon such relatives or the estate of the patient.

(B) The department shall follow the provisions of this division in determining the ability to pay of a patient or his liable relatives and the amount to be charged such patient or liable relatives.

(1) A patient without dependents shall be liable for the full per capita cost. A patient without dependents who has a gross annual income of two thousand dollars or more, regardless of the source of such income, shall pay currently the full amount of the per capita cost; if his gross annual income is less than two thousand dollars, not more than twenty-five dollars per month shall be kept for personal use by or on behalf of the patient and the balance shall be paid currently on his support. The estate of a patient without dependents shall pay any remaining difference between the per capita cost and the amounts prescribed in this section, or shall execute an agreement with the department for payment to be made at some future date under terms suitable to the department.

(2) The ability to pay of a patient with dependents, or a liable relative with or without dependents, shall be determined in accordance with his income, other assets, and the needs of others who are dependent on such income and other assets for support. The patient or his liable relative shall be charged an amount equal to the percentage of the average per capita cost determined in accordance with the

following schedule, or in accordance with division (B) (5) of this section:

GROSS ANNUAL INCOME OF PATIENT OR LIABLE RELATIVE[a]	NUMBER OF DEPENDENTS[b] 1	2	3	4	5 or more
	RATE OF SUPPORT				
$ 3,000 or less	....	....	....	....	....
$ 3,001 to 3,500	10%	....	....	....	....
$ 3,501 to 4,000	15%	10%	....	....	....
$ 4,001 to 4,500	20%	15%	10%	....	....
$ 4,501 to 5,000	30%	20%	15%	10%	....
$ 5,001 to 5,500	40%	30%	20%	15%	10%
$ 5,501 to 6,000	50%	40%	30%	20%	15%
$ 6,001 to 6,500	60%	50%	40%	30%	20%
$ 6,501 to 7,000	70%	60%	50%	40%	30%
$ 7,001 to 7,500	80%	70%	60%	50%	40%
$ 7,501 to 8,000	90%	80%	70%	60%	50%
$ 8,001 to 8,500	100%	90%	80%	70%	60%
$ 8,501 to 9,000	100%	100%	90%	80%	70%
$ 9,001 to 9,500	100%	100%	100%	90%	80%
$ 9,501 to 10,000	100%	100%	100%	100%	90%
$10,001 and over	100%	100%	100%	100%	100%

[a] Patient or relative may use a copy of his federal income tax return as evidence of his gross annual income or he may use other evidence satisfactory to the department of mental hygiene and correction.

[b] Includes liable relative but excludes patient in institution. "Dependent" includes any person who receives more than half of his support from the patient or his liable relative.

(3) A patient or liable relative having medical, funeral, or related expenses in excess of four per cent of the gross annual income, which expenses were not covered by insurance, may adjust such gross annual income by reducing the gross annual income by the full amount of such expenses. Proof of such expenses satisfactory to the department of mental hygiene and correction must be furnished.

(4) Additional dependencies may be claimed if:

(a) The liable relative is blind.

(b) The liable relative is over 65.

(c) A child is a college student with expenses in excess of fifty dollars per month.

(d) The services of a housekeeper, costing in excess of fifty dollars per month, are required if the person who normally keeps house for minor children is the patient.

(e) There are more than five dependents at the rate of ten per cent of the per capita cost per dependent.

(5) If with respect to any patient with dependents there is chargeable under division (B) (2) of this section less than fifty per cent of the per capita cost, and if with respect to such patient there be a liable relative who has an estate having a value in excess of three thousand dollars or if such patient has a dependent and an estate having a value in excess of three thousand dollars, there shall be paid with respect to such patient a total of fifty per cent of the per capita cost on a current basis or there shall be executed with respect to such patient an agreement with the department of mental hygiene and correction for payment to be made at some future date under terms suitable to the department.

(6) When a person has been a patient for fifteen years or more, his liable relatives shall be relieved of support charges.

(7) The department shall accept voluntary payments from patients or liable relatives whose incomes are below the minimum shown in the schedule set forth in this division. The department shall also accept voluntary payments in excess of required amounts from both liable and nonliable relatives.

(8) If a patient is covered by an insurance contract providing for payment of expenses at a hospital or community service unit under the jurisdiction of the department of mental hygiene and correction providing services for mental illness or mental retardation, the other provisions of this division and of section 5121.03 of the Revised Code shall be suspended while such insurance is in force and such patient shall be charged the full amount of the per

capita cost for services at the institution at which the patient receives care.

(9) The rate to be charged for pre-admission care, after-care, day-care, or routine consultation and treatment services shall be based upon the ability of the patient or his liable relatives to pay, but shall not be less than one dollar or more than ten dollars per visit as determined by the department of mental hygiene and correction.

(C) The department of mental hygiene and correction may enter into agreements with a patient with dependents or a liable relative for support payments to be made in the future, or may take mortgages on real estate to secure payments from such persons or from a guardian of the estate of a patient, and may record such mortgages in the office of the county recorder in the county where the real estate is located, and enter satisfaction of such mortgages if the support charged is paid in full.

(D) The department shall, after January 1, 1962, make all investigations and determinations required by this section within ninety days after a patient is admitted to an institution under the department's control, and shall immediately notify by mail the persons liable of the amount to be charged.

(E) All actions to enforce the collection of payments agreed upon or charged by the department shall be commenced within six years after the date of default of an agreement to pay support charges or the date such payment becomes delinquent. If a payment is made pursuant to an agreement which is in default, a new six-year period for actions to enforce the collection of payments under such agreement shall be computed from the date of such payment. For purposes of this division an agreement is in default or a payment is delinquent if a payment is not

made within thirty days after billing or a payment, pursuant to an agreement, is not made within thirty days after the date specified for such payment. In all actions to enforce the collection of payment for the liability for support, every court of record shall receive into evidence the transcript of the charges made by the state together with all debts and credits, and it shall be prima-facie evidence of the facts therein contained.

Section 5121.05, 129 Ohio Laws 1113, Effective January 1, 1962.

The department of mental hygiene and correction may subpoena witnesses, take testimony under oath, and examine any public records relating to the income or estate of *** a patient or of a relative liable for such *** patient's support. All information, conclusions, and recommendations shall be submitted to the department by the investigating agent of the department. The department shall determine the amount of support to be paid, by whom, and whether clothing shall be furnished by the relatives or guardian.***

Section 5121.05, 130 Ohio Laws 1188, Effective October 10, 1963.

The department of mental hygiene and correction may subpoena witnesses, take testimony under oath, and examine any public records relating to the income and other assets of a patient or of a relative liable for such patient's support. All information, conclusions, and recommendations shall be submitted to the department by the investigating agent of the department. The department shall determine the amount of support to be paid, by whom, and whether clothing shall be furnished by the relatives or guardian.

Section 5121.051, 129 Ohio Laws 1113, Effective January 1, 1962.

All outstanding liability of relatives for the support of any patient in a benevolent institution under the control of the department of mental hygiene and correction accrued prior to January 1, 1956 is hereby canceled, provided that this section does not abrogate any written agreements or security arrangement for the payment of support charges entered into between the state of Ohio and any patient or liable relative prior to such date.

Section 5121.051, 130 Ohio Laws 1188, Effective October 10, 1963.

All outstanding liability of relatives for the support of any patient in a benevolent institution under the control of the department of mental hygiene and correction accrued prior to January 1, 1956, including the liability of the patient himself, is hereby cancelled, provided that this section does not abrogate any written agreements or security arrangement for the payment of support charges entered into between the state of Ohio and any patient or liable relative prior to such date.

Section 5121.051, 130 Ohio Laws 247, Effective December 12, 1964.

All outstanding liability of relatives for the support of any patient in a benevolent institution under the control of the department of mental hygiene and correction accrued prior to January 1, 1956, including the liability of the patient himself, is hereby cancelled, provided that this section does not abrogate any written agreements or security arrangement for the payment of support charges entered into between the state and any patient or liable relative prior to such date.

Section 5121.06, 129 Ohio Laws 1114, Effective January 1, 1962.

(A) The following persons are jointly and severally liable for the support of a patient in a benevolent institution under the control of the department of mental hygiene and correction:

(1) The patient or his estate;

(2) The patient's husband or wife;

(3) A minor patient's father or mother, or both;

(4) The patient's adult sons and daughters, unless pursuant to section 2901.42 of the Revised Code they are exempt from liability for the patient's support. No son or daughter shall be liable for any charges for support of a father or mother incurred during such time as the son or daughter was a minor.

(5) An adult patient's father or mother or both.

(B) The department shall determine, pursuant to section 5121.04 of the Revised Code, the amount to be charged each such liable person in the order named in this section, but shall not collect from any person or persons more than one hundred per cent of the average per capita cost applicable to such patient.

(C) An action to collect delinquent payments or to enforce agreements in default may be brought against any or all persons named in this section.

Section 5121.06, 130 Ohio Laws 1188, Effective October 10, 1963.

(A) The following persons other than the patient or his estate are liable relatives and all the following persons are jointly and severally liable for the support of a patient in a benevolent institution under the control of the department of mental hygiene and correction:

(1) The patient or his estate;
(2) The patient's husband or wife;
(3) A minor patient's father or mother, or both;
(4) The patient's adult sons and daughters, unless pursuant to section 2901.42 of the Revised Code they are exempt from liability for the patient's support. No son or daughter shall be liable for any charges for support of a father or mother incurred during such time as the son or daughter was a minor.
(5) An adult patient's father or mother or both.

(B) The department shall determine, pursuant to section 5121.04 of the Revised Code, the amount to be charged each such liable person in the order named in this section, but shall not collect from any person or persons more than one hundred per cent of the average per capita, or per visit, cost applicable to such patient.

(C) An action to collect delinquent payments or to enforce agreements in default may be brought against any or all persons named in this section.

(D) Irrespective of the number of patients whose care might be chargeable against a liable relative, no individual liable relative nor any group of liable relatives who are members of the same family unit shall be charged with the support of more than one patient.

Section 5121.07, 129 Ohio Laws 1114, Effective January 1, 1962.

Any person who has been *** charged with the payment *** of the support of *** a patient of any benevolent institution under the control of the department of mental hygiene and correction, may petition the department for a release from, or modification of, such *** charge, and the department, after an investigation, may cancel or modify such former *** charge, or may cancel, compromise, or settle any accrued liability in an amount not exceeding five hundred dollars; amounts in excess thereof may be can-

celed, compromised, or settled as provided in section 115.17 of the Revised Code. The department may for due cause increase the amount previously ordered paid.

Section 5121.07, 130 Ohio Laws 1189, Effective October 10, 1963.

Any person who has been charged with the payment of the support of a patient of any benevolent institution or for pre-admission care, after-care, day-care, or routine consultation and treatment services in a community service unit under the control of the department of mental hygiene and correction, may petition the department for a release from, or modification of, such charge, and the department, after an investigation, may cancel or modify such former charge, or may cancel, compromise, or settle any accrued liability in an amount not exceeding five thousand dollars; amounts in excess thereof may be cancelled, compromised, or settled as provided in section 115.17 of the Revised Code. The department may for due cause increase the amount previously ordered paid.

Section 5121.21, 130 Ohio Laws 1189, Effective October 10, 1963.

(A) If payment of any amount due the state under the provisions of Chapter 5121. of the Revised Code is made on account of a patient by any liable relative, as defined in division (A) of section 5121.06 of the Revised Code, such relative may recover the following amounts from the following persons; provided, that in no event may such relative recover in total more than such relative has paid the state, and provided, that in no event is the person from whom recovery is sought obliged to pay at a rate of support higher than such person would have paid had the state proceeded directly against such person:

(1) Any liable person may recover from the patient, his guardian, or from the executor or administrator of the

patient's estate, the full amount of payment made by such liable relative.

(2) Any liable relative may recover from the patient's husband or wife, the full amount of payment made by such liable relative.

(3) A minor patient's mother may recover from such minor patient's father the full amount of payment made by such mother.

(4) Any liable relative other than the patient's spouse and other than a minor patient's parent, may recover from such of a patient's adult sons and daughters as are liable under division (A) (4) of section 5121.06 of the Revised Code, the full amount of payment made by such liable relative; provided, that there may be recovered from each such son or daughter only such proportion of the total payment as the figure one bears to the total number of such adult sons and daughters.

(5) An adult patient's mother may recover from an adult patient's father the full amount of payment made by such mother.

APPENDIX J

U. S. Constitution, Amendment XIV, Section I

§ 1 All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

APPENDIX K

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1964.

Syllabus.

DEPARTMENT OF MENTAL HYGIENE OF CALIFORNIA *v.* KIRCHNER, ADMINISTRATRIX.

CERTIORARI TO THE SUPREME COURT OF CALIFORNIA

No. 111. Argued January 19, 1965.—Decided March 8, 1965.

Petitioner sued the administratrix of the estate of a deceased daughter of an adjudged incompetent for the cost of support furnished the incompetent in a state mental institution and recovered a judgment which was reversed by the Supreme Court of California. That court found that the state statute creating support liability "violates the basic constitutional guaranty of equal protection of the law . . . ." *Held*: Since the California court did not specify whether its holding was based on the Equal Protection Clause of the United States Constitution or the equivalent provision of the state constitution, or both, this Court cannot be certain that the judgment below was not based on an adequate and independent nonfederal ground. In light of the doubt as to this Court's jurisdiction, the judgment is vacated and the case remanded. Pp. 195-201.

60 Cal. 2d 716, 388 P. 2d 720, judgment vacated and case remanded.

Elizabeth Palmer, Deputy Attorney General of California, argued the cause for petitioner. With her on the briefs were *Thomas C. Lynch,* Attorney General of Cali-

fornia, *Harold B. Haas,* Assistant Attorney General, and *John Carl Porter* and *Asher Rubin,* Deputy Attorneys General.

Alan A. Dougherty argued the cause for respondent. With him on the brief was *John Walton Dinkelspiel.*

Briefs of *amici curiae,* urging reversal, were filed by *William G. Clark,* Attorney General of Illinois, *Richard E. Friedman,* First Assistant Attorney General, *Richard A. Michael,* Assistant Attorney General, and *Jerome F. Goldberg* and *John E. Coons,* Special Assistant Attorneys General, for the State of Illinois; by *William B. Saxbe,* Attorney General of Ohio, and *Joanne Wharton,* Assistant Attorney General, for the State of Ohio; by *Robert Y. Thornton,* Attorney General of Oregon, and *A. Duane Pinkerton* and *Neil C. Hoyez,* Assistant Attorneys General, for the State of Oregon; and by *John J. O'Connell,* Attorney General of Washington, and *Stephen C. Way,* Assistant Attorney General, for the State of Washington.

Briefs of *amici curiae,* urging affirmance, were filed by *Robert W. Kenny* for the National Federation of the Blind and the California League of Senior Citizens, and by *A. Kenneth Pye, John R. Schmertz, Jr.,* and *Bernard D. Fischman* for the National Association for Retarded Children, Inc., and the American Orthopsychiatric Association.

MR. JUSTICE HARLAN delivered the opinion of the Court.

Mrs. Auguste Schaeche was adjudged incompetent in 1953 and committed to a California state mental institution operated by petitioner. California Welfare and Institutions Code § 6650 provides in pertinent part:

> "The husband, wife, father, mother, or children of a mentally ill person or inebriate, and the administrators of their estates, and the estate of such mentally ill person or inebriate, shall be liable for his care, support, and maintenance in a state institution of which

he is an inmate. The liability of such persons and estates shall be a joint and several liability . . . ."

Ellinor Vance, the daughter of Mrs. Schaeche, died in 1960 and respondent was appointed administratrix of her estate. Petitioner filed a claim for $7,554.22 with respondent, that being the cost of support furnished to the incompetent from 1956 to 1960, which was rejected by respondent. Petitioner then filed suit for that amount and obtain judgment on the pleadings. The District Court of Appeal affirmed, 29 Cal. Rptr. 312, but the Supreme Court of California reversed, finding that § 6650 "violates the basic constitutional guaranty of equal protection of the law . . . ." 60 Cal. 2d 716, 388 P. 2d 720. *We granted certiorari to consider the important questions involved,* 379 U.S. 811. After plenary briefing and argument, however, we are unable to say with requisite assurance that this Court has jurisdiction in the premises.

The California Supreme Court did not state whether its holding was based on the Equal Protection Clause of the Fourteenth Amendment to the Constitution of the United States or the equivalent provision of the California Constitution,[1] or both. *While we might speculate from the choice of words used in the opinion, and the authorities cited by the court, which provision was the basis for the*

---

[1] California Constitution, Art. I, §§ 11, 21, provide in pertinent part: "Sec. 11. All laws of a general nature shall have a uniform operation.

"Sec. 21. No special privileges or immunities shall ever be granted which may not be altered, revoked, or repealed by the Legislature; nor shall any citizen, or class of citizens, be granted privileges or immunities which, upon the same terms, shall not be granted to all citizens."

These provisions have been interpreted by the California courts as being the equivalent of the Equal Protection Clause of the Fourteenth Amendment. See *Department of Mental Hygiene* v. *McGilvery*, 50 Cal. 2d 742, 754, 329 P. 689, 695, quoted *infra*, p. 4; *Lelande* v. *Lowery*, 26 Cal. 2d 224, 157 P. 2d 639; *San Bernardino* v. *Way*, 18 Cal. 2d 647, 117 P. 2d 354; *People* v. *Sullivan*, 60 Cal. App. 2d 539, 141 P. 2d 230; *People* v. *England*, 140 Cal. App. 310, 35 P. 2d 565; 11 Cal. Jur. 2d § 272, and cases cited therein. See also *Los Angeles* v. *Southern Cal. Tel. Co.*, 32 Cal. 2d 378, 196 P. 2d 773, appeal dismissed, 336 U.S. 929.

judgment of the state court, we are unable to say with any degree of certainty that the judgment of the California Supreme Court was not based on an adequate and independent nonfederal ground. This Court is always wary of assuming jurisdiction of a case from a state court unless it is plain that a federal question is necessarily presented, and the party seeking review here must show that we have jurisdiction of the case.[2] Were we to assume that the federal question was the basis for the decision below, it is clear that the California Supreme Court, either on remand or in another case presenting the same issues, could inform us that its opinion was in fact based, at least in part, on the California Constitution, thus leaving the result untouched by whatever conclusions this Court might have reached on the merits of the federal question. For reasons that follow we conclude that further clarifying proceedings in the California Supreme Court are called for under the principles stated in *Minnesota* v. *National Tea Co.*, 309 U. S. 551.

The first mention of any specific constitutional provision in this case appears to have been made in respondent's reply brief in the State District Court of Appeal, and it related solely to the State Constitution.[3] That court disposed of the constitutional claim in one paragraph,[4] citing *Department of Mental Hygiene* v. *McGilvery*, 50 Cal. 2d 742, 754-761, 329 P. 2d 689, 695-699. In *McGilvery* rehearing was granted by the California Supreme Court to consider the claim that "an absolute liability on a mother to pay for the care, support and maintenance of her mentally ill

---

[2] See Note, Supreme Court Treatment of State Court Cases Exhibiting Ambiguous Grounds of Decision, 62 Col. L. Rev. 822 (1962).

[3] Appellant's Reply Brief, p. 2, presented the rhetorical question: "Is not the taking of money from a daughter, or her estate, for the support of a mother who has an estate of her own violative of the Constitution *of the State of California?*" (Emphasis added.)

[4] 29 Cal. Rptr. 312, 317.

daughter in a state institution, is a deprivation of property without equal protection of law and without just compensation in violation of the state and federal Constitutions." 50 Cal. 2d, at 747, 329 P. 2d, at 691. On the pages cited by the District Court of Appeal, the California Supreme Court in *McGilvery* had concluded:

> "Article I, section 11 of the California Constitution requires that all laws of a general nature have a uniform operation. This has been held generally to require a reasonable classification of persons upon whom the law is to operate. The classification must be one that is founded upon some natural or intrinsic or constitutional distinction. [Citations.] Likewise, those within the class, that is those persons similarly situated with respect to the law, must be subjected to equal burdens. [Citation.] The clause of the Fourteenth Amendment to the federal Constitution which prohibits a state from denying to 'any person within its jurisdiction the equal protection of the laws' has been similarly construed."[5]

An examination of the opinion of the California Supreme Court in the case before us does not indicate whether that court relied on the State Constitution alone, the Federal Constitution alone, or both; and we would have jurisdiction to review only if the federal ground had been the *sole* basis for the decision, or the State Constitution was interpreted under what the state court deemed the compulsion of the Federal Constitution.[6]

The court first discussed *Department of Mental Hygiene* v. *Hawley*, 59 Cal. 2d 247, 379 P. 2d 22, a case decided under the Fourteenth Amendment, and then stated, "This holding is dispositive of the issue before us."

The court went on, however, to discuss other cases. After noting that in *Department of Mental Hygiene* v. *Shane*, 142

---

[5] Cal. 2d 742, 754, 329 P. 2d 689, 695.

[6] *State Tax Comm'n* v. *Van Cott*, 306 U. S. 511; *Fox Film Corp.* v. *Muller*, 296 U. S. 207.

Cal. App. 2d Supp. 881, 299 P. 2d 747 (relied on in *McGilvery*), there was no "mention of either the United States or the California Constitutions," *the court distinguished both Shane and McGilvery as cases in which the constitutional claims were not presented.* It then discussed *Hoeper* v. *Tax Comm'n*, 284 U. S. 206, which dealt with reasonable classification, and compared a similar treatment in *Estate of Tetsubumi Yano*, 188 Cal. 645, 656-657 [14], 206 P. 995. In *Yano* the California Supreme Court found an alien land law in violation of the Equal Protection Clause of the Fourteenth Amendment, the Privileges and Immunities Clause, and of the California Constitution. The court's discussion of the Equal Protection Clause, however, was confined to pp. 654-656 of the opinion, and in headnote [14] on page 656 (cited by the court in the present case) the court dealt principally with the state constitutional ground.

After examining the statutory framework of the support statutes, the court in this case finally concluded with the following statement:

> "A statute obviously violates the equal protection clause if it selects one particular class of persons for a species of taxation and no rational basis supports such classification. (See *Blumenthal* v. *Board of Medical Examiners* (1962) 57 Cal. 2d 228, 237 [13] [18 Cal. Rptr. 501, 368 P. 2d 101]; *Bilyeu* v. *State Employees' Retirement System* (1962) 58 Cal. 2d 618, 623 [2] [24 Cal. Rptr. 562, 375 P. 2d 442].) Such a concept for the state's taking of a free man's property manifestly denies him equal protection of the law."

Blumenthal involved an attack on a licensing statute under both the Fourteenth Amendment and §§ 11 and 21 of Article I of the California Constitution. See 57 Cal. 2d, at 232, 368 P. 2d, at 103. The court did not specifically rely on one constitutional provision, but merely held the statute unconstitutional. *Bilyeu* involved an attack on a classifica-

tion for state employees subject to retirement benefits. At headnote [2] of the opinion, cited by the court in *Kirchner*, appears the following language:

> "There is no constitutional requirement of uniform treatment, but only that there be a reasonable basis for each classification."[7]

The use of such language suggests that the court may have been adverting to the California constitutional provision that "all laws of a general nature shall have a uniform operation." Calif. Const., Art. I, § 11.

On the basis of the foregoing, it is clear that we cannot say with the requisite certainty that the California judgment rested *solely* on the Fourteenth Amendment, or, amounting to the same thing, that in striking the statute down under the State Constitution the court below acted under what it conceived to be the compulsion of the Federal Constitution (cf. *Jankovich* v. *Indiana Toll Road*, 379 U. S. 487, 492); one or the other determination would be necessary to our exercising jurisdiction. While the ambiguity of the opinion might normally lead us to dismiss the writ of certiorari as improvidently granted, we think the preferable course is to leave the way open for obtaining clarification from the California Supreme Court (*Minnesota* v. *National Tea Co., supra*), in view of the importance of and widespread interest in the case.[8] *"Unfortunately, because of California law, we cannot hold the case on our calendar until the parties submit a clarifying certificate from the California Supreme Court, see Dixon* v. *Duffy, 344 U. S. 143, 145, but we can obviate undue delay by vacating the judgment of the California Supreme Court,*

[7] 58 Cal. 2d, at 623, 375 P. 2d, at 445.

[8] Forty-two States, Puerto Rico, and the District of Columbia have similar statutes on their books, and nine States have filed *amicus* briefs in this Court, either supporting the petition for certiorari or the petitioner's position on the merits.

directing that our mandate issue forthwith, and giving leave to the parties to file a new petition for certiorari incorporating by reference the record and briefs now on file in this Court, supplemented by such additional papers as may be necessary or appropriate, if on further proceedings the California Supreme Court holds that its judgment does not rest on an adequate independent nonfederal ground.

The judgment of the Supreme Court of California is vacated and the cause remanded to that court for such further proceedings as may be appropriate under state law. The judgment and mandate of this Court shall issue forthwith.

Vacated and remanded.

MR. JUSTICE DOUGLAS, believing it clear that the Supreme Court of California did not rest solely on the Fourteenth Amendment of the Constitution of the United States, would dismiss the writ.

LIBRARY
SUPREME COURT, U. S.

No. 840

IN THE

Supreme Court of the United States

October Term, 1957

On Appeal from the Supreme Court of the State of Ohio

WARD MILLER,

Appellant,

vs.

DOCTOR ROBERT A. HAINES, DIRECTOR, DEPARTMENT OF MENTAL HYGIENE AND CORRECTION, STATE OF OHIO, ET AL.,

Appellees.

MOTION TO DISMISS OR AFFIRM

WILLIAM B. SAXBE
Attorney General
CHARLES S. LOZIER
Chief Counsel
WENDELL A. DOWDEN
Assistant Attorney General
State House Annex,
Columbus, Ohio 43215
Attorneys for Appellees

INDEX
and
Table of Citations

	Page
Motion to Dismiss or Affirm	1
Statement of the Case	1
Argument	3
Conclusion	9
Appendix A—	
Amended Petition, Common Pleas Court, Franklin County, Ohio	1a

Citations

Beach v. *District of Columbia,* 320 F. 2d 790 (D.C. Cir., 1963)	4, 6, 7
Bon Homme County v. *Berndt,* 13 SD 309, 83 NW 333, 50 LRA 351	6
Department of Mental Hygiene v. *Kirchner,* 43 Cal. Rptr. 329, 400 P 2d 321	6
Dept. of Mental Hygiene v. *Kirchner, Administratrix,* 380 U.S. 194	6
Dept. of Mental Hygiene v. *McGilvery,* 50 Cal. 2d 742, 329 P 2d 689	6, 7
Guthrie County v. *Conrad,* 133 Iowa 171, 110 NW 454	6
Kough v. *Hoehler,* 413 Ill. 409, 109 NE 2d 177	6
McGowan v. *Maryland,* 366 U.S. 420, 17 O.O. 2d 151, 6 L. Ed. 2d 393, 81 S. Ct. 1101	8

Napa State Hospital v. *Dasso*, 153 Cal. 698, 96 P 355, 18 LRA NS 643, 15 Ann. Cas. 910 6

People v. *Hill*, 163 Ill. 186, 46 N.E. 796 4

Re Peterson, 157 Or. 696, 74 P 2d 60, 114 ALR 978 6

Rice, Guardian v. *State*, 14 OA 9 8

State v. *Bateman*, 110 Kan. 546, 204 P 682 6

State v. *Webber, Adms.*, 163 OS 598 8

State ex rel Price v. *Huwe*, 105 O.S. 304 ..... 6, 8

16 American Jurisprudence 2d, Section 109, pages 294, 295 5

16 American Jurisprudence 2d, Section 113, page 301.. 5

16 American Jurisprudence 2d, Section 135, pages 331, 332 5

California Constitution, Article I, Sections 11 and 21 .. 7

Ohio Revised Code, Section 3103.03 4

Ohio Revised Code, Section 5121.01, *et seq.* 2, 6

United States Constitution, Amendment XIV, Section I 8

Anno: 48 ALR 734 6

IN THE

Supreme Court of the United States

October Term, 1967

No. ____

WARD MILLER,

Appellant,

vs.

DOCTOR ROBERT A. HAINES, DIRECTOR, DEPARTMENT OF MENTAL HYGIENE AND CORRECTION, STATE OF OHIO, ET AL.,

Appellees.

On Appeal from the Supreme Court of the State of Ohio

MOTION TO DISMISS OR AFFIRM

Appellees move this Court, pursuant to Rule 16 (1) of the Revised Rules of the Supreme Court of the United States, to dismiss this appeal on the ground that it does not present a substantial federal question and that the judgment rests on an adequate non-federal basis or in the alternative to affirm the judgment of the Franklin County, Ohio, Court of Appeals because it is manifest that the questions on which the decision of this cause depends are so unsubstantial as to not need further argument.

STATEMENT OF THE CASE

Keith Miller, the son of Ward M. Miller, Appellant herein, was born on March 27, 1944. He was afflicted from birth with physical and mental disabilities. Upon the request of his father he was committed to the Columbus State School by the Probate Court of Stark County, Ohio, where he

remained from August, 1956, until his death on January 19, 1964, at which time the original appeal was pending in the Court of Appeals of Franklin County, Ohio. The brief of Appellant filed in the Court of Appeals noted the fact of his death at pages 3 and 4.

This action was originally brought in the Common Pleas Court of Franklin County, Ohio, in 1960, in equity, for injunctive relief praying that all assessments for the care and treatment of his son and owing to the State of Ohio be declared void and the State be forever enjoined from taking any action for the collection of such assessments. The Amended Petition is set out in full at Appendix A. It was alleged that the so-called "pay patient" statutes, Section 5121.01, *et seq.*, of the Ohio Revised Code, are unconstitutional under the provisions of both the Ohio and the Federal Constitutions.

Testimony on the issues was taken in June, 1961. On July 29, 1963, the court denied the injunctive relief sought and determined that the statutes challenged were not unconstitutional either in their inception or in their application to Appellant herein.

On appeal to the Court of Appeals of Franklin County, Ohio, the court affirmed the judgment of the Common Pleas Court, which had denied the injunctive relief sought, but did not adopt the opinion of Judge Harter nor take jurisdiction of and decide the constitutional questions raised. In denying the application for reconsideration on January 17, 1967, the Court of Appeals stated:

> "We did not adopt the opinon of Judge Harter and limited our affirmance of the judgment to the issue in this case, the obligation of a parent for the support of his minor child."

On appeal as of right to the Ohio Supreme Court from this judgment the appeal was dismissed *sua sponte* by the

court on the ground that no substantial constitutional question existed and the court, by a separate order, overruled a motion for an order directing the Court of Appeals of Franklin County to certify its record.

ARGUMENT

This action was brought in equity for injunctive relief. Such relief is an extraordinary remedy granted or denied in the exercise of a sound judicial discretion only in conformity with established equitable principles and considerations. Inasmuch as injunctions must operate in the future, the extent and nature of the relief granted must be determined by the facts which exist at the time of the decree. This rule applies not only to changes which occur during the pendency of the action in the trial court, but also to changes occurring while the action is pending in an appellate court.

The facts which will warrant injunctive relief generally include the showing of a clear legal right, an irreparable injury and the lack of an adequate and complete remedy at law. Furthermore, when injunctive relief is requested against the enforcement of statutes, the mere fact that the statute is alleged to be unconstitutional does not necessarily warrant the exercise of the extraordinary injunctive power.

The death of the child, which occurred in January, 1964, made the total liability of this Appellant determinable. Furthermore, he has an adequate remedy at law, for if these statutes are unconstitutional as has been alleged, he would have a complete defense to an action at law brought for collection of the amounts assessed in accordance with the provisions of said statutes. And where is the "clear right" of Appellant to the relief requested?

That there is a duty of a parent to support a minor, incompetent child is well established by common and statu-

tory law. Appellant herein had the duty to support his minor, incompetent son. Such obligation has existed in Anglo-American jurisprudence for over 360 years and has been made a statutory obligation under the laws of Ohio in Section 3103.03, Ohio Revised Code, which reads:

> "The husband must support himself, his wife, and his minor children out of his property or by his labor. If he is unable to do so, the wife must assist him in so far as she is able. If he neglects to support his wife, any other person, in good faith, may supply her with necessities for her support, and recover the reasonable value thereof from the husband unless she abandons him without cause."

The derivation of parental liability for the support of incompetent children was ably discussed in the cases of *People* v. *Hill*, 163 Ill. 186, 46 N.E. 796 and *Beach* v. *District of Columbia*, 320 F.2d 790 (D.C. Cir., 1963). The enactment of the "pay-patient" statutes created no *new* obligation upon the Appellant and as to other named relatives, such obligation was not contrived by the legislature but founded upon an imperfect moral obligation.

Appellant, who has not only a moral duty, but also the legal duty to support his minor son, had the facilities of the state institutions for the mentally retarded available to him for help in the care and treatment of his afflicted child. As a result he was able to restore to normal the home life of his wife and other children and also be assured that proper surveillance, care and training were provided for his incompetent child. He now wishes to shift his full parental responsibility to the state which provided care and treatment for his son in hospitals built, equipped and sustained by the taxpayers of Ohio, the great majority of whom will never receive any direct or immediate benefits from such institutions. He contends that his constitutional

rights have been denied because he had to bear the financial responsibility for the care of his minor son.

The obligation of a parent to support his minor, incompetent child is the basis for the decision of the Court of Appeals in affirming the refusal of the Common Pleas Court to order the injunctive relief prayed for. See Decision, *supra*, page 2.

The decision of the Court of Appeals is supported by the general premises with regard to constitutional questions. It is stated in 16 American Jurisprudence 2d, Constitutional Law, Section 109 at pages 294, 295; Section 113 at page 301; Section 135 at pages 331, 332:

> "The courts invariably give the most careful consideration to questions involving the interpretation and application of the constitution and approach constitutional questions with great deliberation, exercising their power in this respect with the greatest possible caution and even reluctance, and they should never declare a statute void, unless its invalidity is, in their judgment, beyond reasonable doubt. * * *
>
> "It is settled as a general principle that courts will not pass on the constitutionality of an act of the legislature if the merits of the case in hand may be fairly determined otherwise without so doing. Hence if the case may be decided on either one of two grounds and one of these does not involve the constitutionality of a statute, the court will decide it on that ground. Disposition of a constitutional question must be reserved to the last. The court will refuse to decide constitutional questions when the record discloses other grounds for decision, whether or not such other grounds have been properly raised before the court by the parties.
>
> "The rule is well settled that one who voluntarily proceeds under a statute and claims benefits thereby conferred will not be heard to question its constitutionality in order to avoid its burdens. Certainly such a person will not be allowed to retain his advantage or keep his consideration and then repudiate the act as unconstitutional. * * *"

Section 5121.01, *et seq.*, Ohio Revised Code, is substantially similar to the statutes of other states which impose liability for the support of an insane person in a state hospital upon his estate or relatives. The constitutionality of these statutes has been upheld as against objections that they deny equal protection of the laws, are arbitrary or unreasonable, constitute special or class legislation, result in double taxation or are a denial of due process. *Re Peterson,* 157 Or. 696, 74 P 2d 60, 114 ALR 978; *Kough* v. *Hoehler,* 413 Ill. 409, 109 NE 2d 177; *Napa State Hospital* v. *Dasso,* 153 Cal. 698, 96 P 355, 18 LRA NS 643, 15 Ann. Cas. 910; *Bon Homme County* v. *Berndt,* 13 SD 309, 83 NW 333, 50 LRA 351; Anno: 48 ALR 734; *Guthrie County* v. *Conrad,* 133 Iowa 171, 110 NW 454; *State* v. *Bateman,* 110 Kan. 546, 204 P 682; *Beach* v. *District of Columbia, supra; State ex rel Price* v. *Huwe,* 105 O.S. 304; *Dept. of Mental Hygiene v. McGilvery,* 50 Cal. 2d 742, 329 P 2d 689.

The sole case cited as authority for this appeal is the California case of *Dept. of Mental Hygiene* v. *Kirchner, Administratrix,* 380 U.S. 194, and the other decisions reported with regard to the same case. The ultimate holding in that case was that the "pay-patient" statutes of California were unconstitutional, being in derrogation of the California Constitution, Article I, Sections 11 and 21, as a general law requiring uniform operation.

It is denied that the decision of the Supreme Court of California in the case of *Department of Mental Hygiene* v. *Kirchner,* 43 Cal. Rptr. 329, 400 P 2d 321, is authority for the determination of this case. In that case the Department brought a claim against an intestate's estate for the support of the intestate's mother in a state mental institution. At the time the mother was living and had over $11,000 in her own guardianship account. The California Supreme

Court held that a statute which imposes upon one adult, because of a family relationship, a duty to support another adult who is confined in a mental institution is unconstitutional, being in violation of the California Constitution, Article I, Sections 11 and 21. This case differs from the one herein presented for the following reasons: 1) that case involved the liability of an adult child for the support of a parent where we are considering the liability of a father for the support of a *minor* son; 2) the liability in California is joint, severable, and unconditional while no such language appears in Ohio statutes and such have been recognized to create a secondary liability as to relatives; and 3) the court found that a relative could be "denuded" of his assets without any consideration of ability to pay while the Ohio statutes clearly recognize the ability to pay for all considered liable.

Although that case does not answer the questions herein presented, Appellees feel it necessary to mention the following objections to the soundness of this decision: 1) contrary to the opinion of the court a case had been previously decided on this constitutional question (*Beach* v. *District of Columbia,* 320 F. 2d, 790 [D.C. Cir, 1963]); 2) the court did not give proper consideration to prior California cases such as *Dept. of Mental Hygiene* v. *McGilvery,* 50 Cal. 2d 742, 329 P. 2d. 689; 3) the court gave no effect to the benefits to the individual and the family for the care and treatment of the insane, which is contrary to many pronouncements of the courts; and 4) the court arbitrarily found no rational basis for such classification. As to this latter criticism it would seem that this subject is one for determination by the legislature, not the courts. For the court to say that a family relationship with its natural moral obligations does not provide a rational basis for classification appears

inconsistent with the prevailing view that state statutes in equal protection cases should be interpreted insofar as possible to be predicated upon legislative consideration.

The Ohio courts have examined various aspects of these statutes and found them to be constitutional. *State ex rel Price* v. *Huwe, supra; State* v. *Webber, Adms.*, 163 OS 598; *Rice, Guardian* v. *State*, 14 OA 9.

In view of the holdings of the Ohio courts, if *Kirchner* is now the law in California without benefit of the Fourteenth Amendment, then the present decisions are constitutional in Ohio, even in consideration of the Fourteenth Amendment, where our constitutional interpretation has adequately covered the problem of classification; *McGowan* v. *Maryland*, 366 U.S. 420, 17 O.O. 2d 151, 6 L. Ed. 2d 393, 81 S. Ct. 1101, wherein it is stated:

> "The Fourteenth Amendment permits the states a wide scope of discretion in enacting laws which affect some groups of citizens differently than others, and the constitutional safeguard is offended only if the classification rests on grounds wholly irrelevant to the achievement of the state's objective."

In spite of the fact that there has been a great deal of public interest generated by the *Kirchner* case and others, it is nevertheless contended that the facts of this case and the issues presented herein do not warrant the consideration of this Court of the constitutional questions allegedly raised. The public interest which has been generated is not so great that this Court needs to or should take jurisdiction of constitutional questions which are irrelevant to a just decision based upon other grounds.

CONCLUSION

It is respectfully submitted that this Motion to Dismiss should be sustained for the reasons set forth herein, or in the alternative, that the Court should Affirm the decision of the Ohio courts.

Respectfully sumitted,

WILLIAM B. SAXBE
Attorney General
CHARLES S. LOPEMAN
Chief Counsel
WINIFRED A. DUNTON
Assistant Attorney General
State House Annex
Columbus, Ohio 43215
Attorneys for Appellees.

APPENDIX "A"

IN THE COURT OF COMMON PLEAS OF FRANKLIN COUNTY, OHIO

No. 208046

WARD M. MILLER,

Plaintiff,

vs.

DOCTOR ROBERT A. HAINES, Director, Department of Mental Hygiene and Correction, State of Ohio and WALTER S. BURKE, Supervisor, Bureau of Support Department of Mental Hygiene and Correction, State of Ohio,

Defendants.

AMENDED PETITION

1. Plaintiff is and has been at all times referred to herein a citizen and taxpayer of the State of Ohio, presently residing at 562 Butler Avenue in the City of Columbus, County of Franklin in said State of Ohio.

2. Defendant Haines is the Director of the Department of Mental Hygiene and Correction in the State of Ohio and as the superior of Defendant Burke, has control and executive discretion over the administration and policy of the Bureau of Support which is a division of the Department of Mental Hygiene and Correction.

3. Defendant Burke was for many years, the supervisor of said Bureau of Support within the Department of Mental Hygiene and Correction of the State of Ohio; and as such supervisor, it was his duty to carry out the policies of the Department as well as enforce and comply with the laws

of the State of Ohio as they may apply to the monetary support of the institutions managed, administered and maintained by the State of Ohio through its Department of Mental Hygiene and Correction.

4. Plaintiff is the natural father of a sixteen year old boy who was diagnosed by competent medical authority in December of 1956 as being completely helpless, physically incapacitated, and afflicted with the following ailments and infirmities:

> Chronic Brain Syndrome associated with diseases and conditions due to pre-natal influences. Paraplegia and mental deficiency. This is not a congenital anomaly since it is based on Cranial Arnoid Chiari Syndrome. Spina Bifida with meningecele sac in lumbo-sacral area accompanied with Hydrocephalus. Strabismus and Scoliosis.

5. In August of 1956, plaintiff applied for the admittance of his son to an institution being operated by the Department of Mental Hygiene and Correction, Division of Mental Hygiene, and in the process of pursuing such application, discovered that for his son to receive the medical care and treatment necessitated by his illness, plaintiff must irrevocably commit him to the care of the Department as a ward of the State of Ohio and abandon any and all control and dominion over the well being and care of his said son. Said child is presently an inmate at the Columbus State School in the City of Columbus, Ohio, and has been so confined since August of 1956.

6. As a mandatory condition precedent to the complete and irrevocable surrender of his son's care and upbringing to the State of Ohio as its ward, Plaintiff was required to sign an instrument whereby he was obligated to pay assessments as levied by the Bureau of Support for alleged reimbursement to the State of Ohio for its costs of maintaining his son.

7. At the time of the Probate Decree ordering his son's commitment, the rate for support being charged by the Bureau of Support was $15.75 per week. Plaintiff, being a man of limited means, met with the agent of the Bureau of Support and agreed to make a weekly payment of $2.80. The Bureau of Support defined its position as to the difference between plaintiff's weekly compromise payment of $2.80 and the then Bureau computed per capita rate of $15.75 in a notice dated October 6, 1956, a copy of which is marked Exhibit "A" and attached hereto to be incorporated as if rewritten herein.

8. On December 20, 1957, Defendant Burke forwarded another notice, a copy of which is marked Exhibit "B" and attached hereto, to inform Plaintiff that the rate had been increased to $21.00 per week; which left a balance of $18.20 accruing each week to become a charge against Plaintiff, his wife or children, or his estate, so long as his son remained alive.

9. On December 14, 1959, Plaintiff received a further demand from Defendant Burke, a copy of which is marked Exhibit "C" and attached hereto which advised him that the rate had been recomputed to $24.50 per week. This increased the weekly accrual against plaintiff's children, his wife and his estate to $21.70.

10. The net result of these increases in the weekly rate, the same having resulted in an increment of $8.75 or fifty per cent in less than four years, has left plaintiff owing the State of Ohio $3,133.20 as of March 31, 1960.

11. And further, Section 5121.03 of the Ohio Revised Code specifically provides that collections in excess of five dollars and fifty cents per week be placed in a rotary fund for the general use of the Division of Mental Hygiene, Department of Mental Hygiene and Correction. The rotary fund to be so subsidized by Plaintiff's estate, is allocated

by the controlling statute to the use of the Department's Bureau of Psychiatric Training and Research; a division of the Department of Mental Hygiene and Correction which cannot in any way be of use or value to Plaintiff's son.

12. Plaintiff has been advised that his past obligations may be collected through legal certification to the Attorney General of the State of Ohio, at such time as may be deemed appropriate; and that any property which he may own at the time of his death is subject first to a claim of the State of Ohio through Defendant Burke despite the needs of his family by way of shelter, food, education and the other necessities of life. Plaintiff is powerless to escape the incessant increases in the per capita charges for the maintenance of his mentally retarded son since said child is a ward of the State and may be released from the institutional program only at the discretion of Defendant Haines. Further, unless plaintiff is able to receive from this Court of Equity, he will be deprived of any hope of ever acquiring the peace of mind, quiet and useful enjoyment of his property, security and the benefits of being a citizen of the State of Ohio and the United States of America which the Constitutions of both of those governments set forth and guarantee in his behalf.

13. Plaintiff says that the facts stated above result in his being denied his rights as a citizen and taxpayer by reason of inequitable treatment; and that he is deprived of inalienable safeguards guaranteed by the Constitution of the State of Ohio.

14. In addition to the foregoing inequities and unconstitutional invasions of plaintiff's rights as a citizen and taxpayer, Plaintiff states that the assessments that have been levied against him by Defendants herein and the

Bureau of Support for the past four years, are invalid for the following reasons:

A. Article VII, Section I, of the Constitution of the State of Ohio provides for the support by the State of Ohio of Institutions for the benefit of the insane, blind, and deaf and dumb. Since there is no charge being made by the State of Ohio for the support of inmates in the schools for the deaf and dumb and blind, there results an invalid discrimination or classification when assessments are levied against one segment within a class where uniformity is required by Article II, Section 26 of the Constitution of the State of Ohio.

B. Sections 5121.03 through 5121.06, inclusive, of the Ohio Revised Code setting out the rate and method of collecting the assessment for the support of inmates of benevolent institutions under the jurisdiction of the Department of Mental Hygiene and Correction, are invalid because said sections abuse the delegation of legislative authority to assess and provide for the collection of taxes and assessments.

C. Sections 5121.03, 5121.04 and 5121.05 of the Ohio Revised Code are invalid because through the investment of power in the Supervisor of the Bureau of Support of the Department of Mental Hygiene and Correction they deprive the taxpayers assessed thereunder the privilege and protection of due process of law in derrogation of the Constitution of the State of Ohio.

D. Defendants herein in their execution of Sections 5121.03 through 5121.06 inclusive, of the Ohio Revised Code have illegally and arbitrarily computed the rate of support to be charged plaintiff from the time of the commitment of his son.

E. Sections 5121.03 through 5121.06 inclusive, of the Ohio Revised Code in the force and effect of their administration and execution by Defendants herein are in violation of the Fourteenth Amendment of the Constitution of the United States in that they result in a deprivation of property without due process of law and deny Plaintiff equal protection of the laws of the State of Ohio.

15. And further, Plaintiff states that he has no adequate remedy at law and that unless Defendants are enjoined from collection of the assessments set forth herein he will suffer irreparable harm.

16. WHEREFORE, Plaintiff prays that said assessments presently claimed as due and owing by him to the State of Ohio be declared void and without effect; that Defendants and each of them be enjoined from collecting and taking any action to collect said assessments or any part thereof, and that upon final hearing of this cause said injunction may be made perpetual, and for all other and further relief to which Plaintiff may be by law or equity entitled.

EAGLESON AND CHILDERS
By JOHN S. BOWERS
Attorneys for Plaintiff.

VERIFICATION

COUNTY OF FRANKLIN)
) SS:
STATE OF OHIO)

Before me, a notary public in and for said County, appeared Ward M. Miller, who after being duly cautioned and sworn says that he is the Plaintiff in this action and that the facts stated and allegations contained in the foregoing petition are true.

WARD M. MILLER

Sworn to before me and subscribed in my presence this ..... day of October, 1960.

.....
Notary Public.

My Commission Expires.....

[redacted]

INDEX

and

TABLE OF CITATIONS

Brief in Reply to Appellees' Motion to Dismiss or Affirm 1
Argument 1
Conclusion 9

Citations

Department of Mental Hygiene v. Kirchner, 36 Cal. Rptr. 488 7
Department of Mental Hygiene v. Kirchner, 380 U.S. 194 ..... 2, 3, 4, 5, 8
Department of Mental Hygiene v. McGilvery, 50 Cal. 2d. 742, 329 P. 2d. 689; 3 7
Beach v. District of Columbia, 320 F 2d. 790 [D.C. Cir. 1963] 7
State, ex rel Price v. Huwe, 105 O.S. 304 6
State v. Webber, Adms., 163 O.S. 598 6
Rice, Guardian v. State, 14 Ohio App. 9 6
Appellant's Jurisdictional Statement 2, 3, 4
Appellees' Motion to Dismiss or Affirm Page 3 1
Appellees' Motion to Dismiss or Affirm Page 4 ..... 2, 6
Appellees' Motion to Dismiss or Affirm Page 6 5
Ohio Constitution, Article VII, Section 1 ..... 3, 5, 8
California Welfare & Institutions Code, Section 6651.. 8
Ohio Revised Code, Section 5121.06 8

IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

No. 840

WARD MILLER,

Appellant,

vs.

DOCTOR ROBERT A. HAINES, DIRECTOR, DEPARTMENT OF MENTAL HYGIENE AND CORRECTION, STATE OF OHIO, ET AL.,

Appellees.

On Appeal from the Supreme Court of the State of Ohio

BRIEF IN REPLY TO APPELLEES' MOTION TO DISMISS OR AFFIRM

Appellant, Ward Miller, pursuant to Rule 16 (4) of the Revised Rules of the Supreme Court of the United States, files this brief in opposition to Appellees' Motion to Dismiss or Affirm for the reason that the grounds set forth therein alleged to be dispositive of this appeal have no basis in fact or law.

ARGUMENT

Appellees' statement of grounds claimed to warrant dismissal by the Supreme Court of the United States of Ward Miller's appeal, or the affirming of the Franklin County, Ohio, Court of Appeals, as set forth in their motion to dismiss or affirm, are refuted in order of appearance therein.

There is a Substantial Federal Question

The Court is respectfully referred to pages 13 through 16 of Appellant's Jurisdictional Statement filed hereinbefore, wherein the substantialness of the questions involved in the landmark case of *Department of Mental Hygiene vs. Kirchner, Admx.*, 380 U.S. 194, as noted by the Supreme Court speaking through Justice Harlan, is reviewed. The Court may be quoted from that decision as follows:

> "... We granted Certiorari to consider the important questions involved." 379 U.S. 811 (380 U.S. 194 at page 196);

And further:

> "... we think the preferable course is to leave the way open for obtaining clarification from the California Supreme Court (*Minnesota vs. National Tea Co., supra*), in view of the importance and widespread interest in the case...." 380 U.S. 194 page 200.

As stated before, the Supreme Court of the United States has already determined the existence of a substantial federal question, which of course vitiates Appellees' contention that the appeal must be dismissed on this ground.

The Judgment Does Not Rest On An Adequate Non-Federal Basis

A careful search of Appellees' statement and argument failed to reveal any discussion of the "adequate non-federal basis" referred to in the body of the Motion to Dismiss or Affirm itself. However, as the alternative to the non-federal basis mentioned, Appellees continue with "... or in the alternative to affirm the judgment of the Franklin County, Ohio, Court of Appeals,". By elimination, the judgment referred to as resting on an adequate non-federal basis must be the judgment of the Franklin County Court of Common

Pleas. In Appellant's Jurisdictional Statement on page 22 A, wherein Judge Harter's decision on the trial of the instant case was set out, the next to the last paragraph reads as follows:

> "For these reasons, I feel compelled to rule that Sections 5121.01 et seq., Revised Code of Ohio, (the so-called "pay-patient" statutes) are valid, and not in violation of Section 1, Article VII of the Constitution of Ohio, *or of the fourteenth Amendment to the Constitution of the United States, through a denial of the equal protection of the law, or in the taking of property without due process of law.*" (emphasis ours)

In *Kirchner,* the Supreme Court of the United States had difficulty in determining whether it was the State of California's Constitution or the Constitution of the United States that enabled the Supreme Court of California to strike down the "pay-patient" statutes of that State and remanded the case on that basis for clarification. There is no such confusion presented here, inasmuch as Judge Harter very definitely and specifically included the Federal Constitution and rejected the existence of denial of equal protection or due process of the law. As to whether or not the constitutional interpretation advanced by Judge Harter may be termed adequate on either a federal or non-federal basis, it would seem that his application of the Fourteenth Amendment to the present question as it stands is definitely inadequate; and for that reason deserves the privilege of adjudication that this Court may provide. It is emphatically urged that Appellee may not now attempt to select from context only that part of Judge Harter's decision applying the tests of the State Constitution to the statutes in question, so as to escape the natural consequences of his concurrent evaluation and determination of the constitutionality of the State statutes in the light of the Fourteenth Amendment to the Federal Constitution.

The Questions Involved Are Not So Unsubstantial As To Not Need Further Argument

The positive corollary to this sub-title as used in Appellees' motion can only be considered a self-serving but futile conclusion. The Court is once again respectfully referred to the comments encompassing the scope of public concern, the importance of the questions, and the widespread interest noted by the decision and footnotes to *Department of Mental Hygiene of California v. Kirchner, Admx.*, 380 U.S. 194.

ARGUMENT IN GENERAL

Moving hastily from the three specific grounds enumerated in their motion, Appellees strenuously contend in the body of their argument that:

> "Appellant, Ward Miller, has an adequate remedy at law, for if these statutes are unconstitutional as has been alleged, he would have a complete defense to an action of law brought for collection of the amounts assessed in accordance with the provisions of said statutes." (Appellees Motion to Dismiss or Affirm page 3)

On February 13th of 1961, Judge Dana F. Reynolds of the Common Pleas Court of Franklin County, Ohio, overruled a demurrer filed against Appellant's original petition on the basis that:

> ". . . there should be a showdown with respect to the constitutional question without waiting until after plaintiff's death or until the claimed obligation has reached such proportions as might seriously affect plaintiff's mentality." (Jurisdictional Statement, Appendix 25 A)

While Judge Reynolds recognized the importance of a constitutional determination, Appellees contend that Appellant has an adequate remedy at law by merely claiming the statutes unconstitutional; even though this determination has yet to be made and is, in fact, presently before this

Court for that purpose. The decision as to the "clear right" of an Appellant to the injunctive relief originally sought, was defined by Judge Reynolds when he overruled the demurrer and for once and all determined and forever set away consideration of this question. Having survived that onslaught, the question of unconstitutionality is yet completely open and under scrutiny; and will remain in an indeterminate state until such time as the Supreme Court of the United States adjudicates the final issue, save and excepting the apparent analogy of *Kirchner*. Obviously, with the Supreme Court of the State of Ohio having for all intent and purpose validated the determination of constitutionality in the Ohio Common Pleas Court, and with the Court of Appeals of Franklin County, Ohio, neatly dodging the issue with their confusing avoidance of any constitutional determination whatsoever, Appellant's position, if forced to refile his action as Appellees suggest, would be that of immediate flight before the tax collectors, or the imposition of a succession of appeal bonds that would be beyond his financial capability.

The page and a quarter of argument devoted to the obligation of a parent to support his minor incompetent child must fall mute before Article VII, Section 1 of the Ohio Constitution itself which reads:

> **"Section 1. Insane, blind and deaf and dumb.**
>
> Institutions for the benefit of the insane, blind, and deaf and dumb, shall always be fostered and supported by the state; and be subject to such regulations as may be prescribed by the general assembly." (Article VII, Section I of Ohio Constitution)

In anticipation of protest by Appellees. the Court is referred to page 6 of Appellees' Motion to Dismiss or Affirm, wherein Counsel for Appellees concur in the conclusion that the present day mentally retarded individual is the vestige of the insane referred to in Article VII, Section 1

of the Ohio Constitution supra. If Appellees' contention of moral duty and legislative coagulation of imperfect moral obligation is to be given credence, then they must also explain away the state-wide and totally supported programs of institutionalization and care for the blind; and the magnificent schools, resident teacher programs, visiting rehabilitation staffs and other benefits established for the deaf and dumb by the same taxpayers "who never receive any direct or immediate benefits from such institutions." (Motion to Dismiss or Affirm, page 4). And in passing, it would be an oversight to omit the juvenile delinquents, the state supported and administered Boys' Industrial Schools, and the ever-increasing requirements from the responsibility on the state to police, care for, and protect society from other minor children of harassed parents who are incarcerated without benefit of any legislative imperfect moral obligation.

Again, Appellees cite *State ex rel Price v. Huwe*, 105 O.S. 304; *State vs. Webber, Adms.*, 163 O.S. 598, and *Rice, Guardian vs. State*, 14 O.App. 9, as being authority for the contention that the Ohio Courts have found the "pay-patient" statutes constitutional. Such could not be further from fact. *State ex rel Price v. Huwe* is not in point because it dealt with a mandamus action between governmental officials in variant political subdivisions. The Appellate Court in *Rice, Guardian vs. State* assumed that the parents and liable relatives of all of the Ohio Constitutional class of insane, blind, and deaf and dumb, were being assessed alike for their support in state institutions; and *State vs. Webber, Adms.*, while closer to home, did not consider the constitutional question as that issue was not raised in the Trial Court or the Court of Appeals. Consequently, the constitutionality of the statutes presently under consideration remains a confused uncertainty in the State of Ohio

and in some 40 of her sister states. The California Supreme Court in the *Kirchner* case, 36 Cal. Rptr. 488 on page 491 commented on the scarcity of authority, case law and resulting confusion:

> "... no case which squarely ... sustained such statutes in the light of the basic question as to equal protection of the law in a case wherein it was sought to impose liability upon one person for the support of another in a state institution ..." 36 Cal. Rptr. 488 at page 491.

Appellees criticize the California Supreme Court for overruling, without proper consideration, such cases as *Department of Mental Hygiene vs. McGilvery,* 50 Cal. 2d 742 329 P. 2d. 689; 3 *Beach v. District of Columbia,* 320 F 2d, 790 [D.C. Cir. 1963], and others. The decision in the *Beach* case, upon consideration, is found to rest solely on a due process argument without treatment of the equal protection requirement.

Appellees press to differentiate between the "pay-patient" statutes existent at the time of the *Kirchner* decision in California and those complained of in the case at bar, and attempt to distinguish *Kirchner* on this basis. However, contrary to Appellees' desire to curtail the scope of that decision, the California Supreme Court ruled those "pay-patient" statutes unconstitutional while imposing the liability of support on any relative designated by statute; and did not limit its effect to the support of a parent for an adult child as suggested. The citation above from the *Kirchner* case shows no such imagined distinction; for the California Supreme Court refers to the legislative purpose as being, "... a case wherein it was sought to impose liability upon one person for the support of another in a state institution." (36 Cal. Rptr. 488 at page 491.)

In closing, it is respectfully submitted that argument concerning joint and several liability and whether or not the

criteria of ability to pay are both inherent in the California and Ohio statutes is time consuming but futile. Section 5121.06 of the Ohio Revised Code sets forth the joint and several liability, and Section 6651 of the California Welfare and Institutions Code provides for reduction, cancellation and remission on the basis of an inability to pay. The two sets of "pay-patient" statutes are foursquare on these matters as are the constitutions of the two states. Furthermore, as the United States Supreme Court stated in its decision on *Kirchner*:

> "The California Supreme Court did not state whether its holding was based on the equal protection clause of the Fourteenth Amendment to the Constitution of the United States or the *equivalent* provision of the California Constitution or both." (380 U.S. 194 at page 196) (emphasis added)

We attach emphasis to the word "equivalent", and it is submitted that this similarity alone would give cause for the Supreme Court of the United States to take jurisdiction of this cause in light of the present attack on an analogous ruling of constitutionality imposing validity on the identical statutory provisions of a sister state. The question is no longer confined to California, and the geographical jurisdiction of that State's Supreme Court does not now remain the only area wherein the constitutional validity of an identical set of laws are presently receiving the benefit of judicial scrutiny. The forty-two states with similar statutes on their books, Puerto Rico, the District of Columbia and especially the nine state Attorney Generals who filed *amicus* briefs on the *Kirchner* matter, await the outcome of this appeal. (See footnote 8, 380 U.S. 194) This cause is a substantial federal question and of great and unusual public concern.

CONCLUSION

It is respectfully requested that Appellees' Motion to Dismiss or Affirm be overruled for the reasons set forth herein.

Respectfully submitted,

FREEMAN T. EAGLESON, JR.
40 South Third Street
Columbus, Ohio 43215
Attorney for Appellant.

LIBRARY
SUPREME COURT, U. S.

IN THE

Supreme Court of the United States

October Term, 1967

No. 340

WARD M. MILLER,

Appellant,

v.

DOCTOR ROBERT A. HAINES, DIRECTOR, DEPARTMENT OF MENTAL HYGIENE AND CORRECTION, STATE OF OHIO, ET AL.,

Appellees.

On Appeal from the Supreme Court of the State of Ohio

PETITION FOR REHEARING

Thomas E. Bowman, Jr.
Bowman & Bowman
Attorneys for Appellant
30 South Third Street, Columbus, Ohio
43215

IN THE

Supreme Court of the United States

October Term, 1967

No. 840

WARD M. MILLER,

Appellant,

v.

DOCTOR ROBERT A. HAINES, DIRECTOR, DEPARTMENT OF MENTAL HYGIENE AND CORRECTION, STATE OF OHIO, ET AL.,

Appellees.

On Appeal from the Supreme Court of the State of Ohio

PETITION FOR REHEARING

Appellant submits this petition for a rehearing of his appeal as presented in the Jurisdictional Statement filed with this Court, Appellees' opposing motions and Appellant's Reply Brief thereto on the following grounds:

1. By dismissing the instant case for want of a substantial federal question, the United States Supreme Court is affirming the Franklin County Ohio Court of Appeals and overruling the Supreme Court of California.

The Franklin County Ohio Court of Common Pleas, in paragraph 5 of its journal entry of October 25, 1963, found the "pay-patient" statutes constituting the subject matter of this appeal not in violation of either the Constitution of the State of Ohio or the Fourteenth Amendment to the Constitution of the United States. The Franklin County Ohio Court of Appeals in a most confusing pair of decisions dated April 26, 1966, and January 17, 1967, affirmed the Franklin County Ohio Common Pleas Court only as to the obligation of a parent for support of his minor child. However in its decisions the Ohio Court of Appeals incorporated by reference, as having been considered, *Department of Mental Hygiene of California vs. Evelyn Kirchner, Admx.*, with all of its decisions and ramifications. (36 Cal. Rptr. 488, 43 Cal Rptr. 329, or 400 P. Rptr. 2d 321, 380 U.S. 194) The California Supreme Court, in referring to that State's Constitution, Article I, Sections 11 and 21, stated:

> "These provisions of our State Constitution have been generally thought in California to be substantially the equivalent of the equal protection clause of the Fourteenth Amendment to the United States Constitution. While it is our view that we should reach the same conclusion under the Fourteenth Amendment we were, (and we are) in any event independently constrained to the result we reached by Sections 11 and 21, Article I of the California Constitution....."
> 400 P. Rptr. 2nd Series 322.

The California Court specifically overruled the line of cases prior to that time which had found the same distinction in the parent's liability for support of his minor child

that the Franklin County Ohio Court of Appeals espouses in its decisions. It is respectfully submitted that by incorporating *Kirchner*, the Ohio Court of Appeals has considered and cast aside the merits of the California Supreme Court ruling and effectively obliterated it. Despite the fact that a federal question was plainly raised in the initial stages of the instant appeal, in that the trial court spuriously endorsed the validity of the statutes which had been alleged as violative of the Fourteenth Amendment to the Federal Constitution, the Supreme Court of the United States reportedly has found no federal question of sufficient substance to entice its jurisdiction. However, as the Ohio Court of Appeals decision incorporates and by reference overrules the precedent of the California decision to the benefit of the forty-one State courts having comparable support statutes because of the federal question originally raised, the action of the United States Supreme Court so far has been to affirm the Franklin County Ohio Court of Appeals in its interpretation of the Fourteenth Amendment. It is respectfully submitted that this is an area reserved to the Federal Judiciary; for the irreparable harm and loss resulting from the consequences of the statutes under consideration will never be recovered in any of the forty-one states unless Appellant is justly afforded the relief sought herein.

2. Because of the failure of the Supreme Court of the United States to accept jurisdiction of this matter, the State of Ohio, emboldened by this Court's de facto endorsement of the "pay-patient" support program, is vigorously pursuing the issuing of capital improvement revenue bonds to be retired by taxes assessed against Appellant and other parents and liable relatives of mentally retarded persons.

The Director of the Department of Mental Hygiene & Correction of the State of Ohio has proposed to the State legislature that some 30 million dollars of revenue bonds be authorized for sale to be retired by the support payments of parents and liable relatives of the mentally retarded. The proceeds from these bonds would be for the capital improvements of all institutions in the State, regardless of whether or not the inmate for whose support the tax was assessed against the parent or liable relative could or was permitted to utilize same. Such a proposal creates so startling a possibility of violation of the equal protection clause of the Fourteenth Amendment to the Constitution of the United States as to create a general exodus from the State of Ohio. Only the inability of parents and liable relatives to withdraw the inmate whose incarceration generates the inequitable assessment, the validity of which we seek to have adjudicated by this Court, renders escape impossible for these unfortunate and helpless citizens.

3. As the Supreme Court of Ohio did not take jurisdiction of the appeal from the Franklin County Ohio Court of Appeals, and did not order that Court to certify its record, said record was certified from that inferior court to the United States Supreme Court. In deciding not to take jurisdiction of the instant appeal, the United States Supreme Court has opened the door for the separate states to tax the parents and liable relatives of juvenile criminals for the expense of their incarceration in state institutions.

On December 6, of 1967, a Lake County, Ohio, jury found Fred M. Esherick, Jr. guilty of first degree murder for slaying his father with a bayonet and did not recommend mercy. This 16 year old boy had also attempted to eliminate his mother, and had succeeded to the extent of putting both

parents in the trunk of an automobile and then rolling them into a flowing creek. As the controlling precedent and case law in the State of Ohio with regard to a parent's liability for the support of his minor child in a state institution stems from the Franklin County Ohio Court of Appeals decisions of April 26, 1966, and January 17, 1967, there is no barrier to deter the Department of Mental Hygiene and Correction of the State of Ohio from charging Fred's surviving parent for the trial costs, the incarceration and actual expenses of the execution of this minor defendant. Nor is it ridiculous to conclude that should this 16-year-old minor be found mentally deficient or retarded by psychiatric examination, and the possibility of such a determination would seem likely in view of the age of the child, he will be transferred to a state institution for the mentally retarded. Perhaps the same institution that housed Appellant Ward Miller's son; and the parents and liable relatives of the persons incarcerated there at the time of such transfer will be taxed for the cost of his maximum security, extra guards and such other care and treatment as he may require. Meanwhile, other minor inmates suffer the possibility of the same type of bayonet attack that overwhelmed this juvenile criminal's mother and father.

Even in California, the lack of a mandate from the Supreme Court of the United States has nurtured a veritable flood of cases brought by that State's Department of Mental Hygiene and Correction and County administrations in an attempt to reinstate the discriminating income producing support-collection procedures of the "pay-patient" statutes. (See 18 Hastings L.J. 720, (1967) Since *Kirchner*, it has been held in *County of Alameda vs. Espinosa* (243 A.C.A. 685, 52 Cal. Rptr. 480) that where "confinement for the dual purpose of protection of the public

at large and his reformation and rehabilitation . . . .," relatives, if otherwise liable, can be charged for the expense of his care. (243 A.C.A. at 700, 52 Cal. Rptr. at 489). How near such language draws to Fred M. Escherick, Jr.; especially if his sentence is commuted to life imprisonment, which would seem a justifiable alternative.

CONCLUSION

For these reasons, Appellant Ward Miller prays that the Supreme Court of the United States reconsider its decision and undertake a review of the interpretation of the Federal constitution determined by the Franklin County Ohio Court of Appeals. The matter is common to forty-two of the fifty States; and even when laid to rest by a State Supreme Court, it would seem that the decision of the United States Supreme Court alone can finally resolve the question.

Respectfully submitted,

FREEMAN T. EAGLESON, JR.
Attorney for Appellant
40 South Third Street
Columbus, Ohio 43215

CERTIFICATE OF COUNSEL

Attorney for Appellant hereby certifies that this petition for rehearing is filed in good faith and not for delay.

FREEMAN T. EAGLESON, JR.
Attorney for Appellant

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1967.

MILLER *v.* HAINES, DIRECTOR, ETC., ET AL.

APPEAL FROM THE SUPREME COURT OF OHIO.

No. 840. Decided January 15, 1968.

PER CURIAM.

The motion to dismiss is granted and the appeal is dismissed for want of a substantial federal question.

MR. JUSTICE DOUGLAS is of the opinion that probable jurisdiction should be noted.